

REPORT  
OF THE  
SECOND ANNUAL MEETING  
OF  
THE AMERICAN  
BAR ASSOCIATION,

Held at Saratoga Springs, New York, August 20th and 21st, 1879.

---

PHILADELPHIA:  
E C. MARKLEY & SON, No. 422 LIBRARY STREET.  
1879.



REPORT  
OF THE  
SECOND ANNUAL MEETING  
OF  
THE AMERICAN  
BAR ASSOCIATION.

Held at Saratoga Springs, New York, August 20th and 21st, 1879.

---


PHILADELPHIA:

E. C. MARKLEY & SON, No. 422 LIBRARY STREET.  
1879.



## CONTENTS.

	PAGE.
Proceedings of the Meeting, . . . . .	5
Constitution, . . . . .	20
By-Laws, . . . . .	24
Officers, . . . . .	27
Committees, . . . . .	32
Members, . . . . .	34
President's Address, . . . . .	51
Paper by Calvin G. Child, . . . . .	71
Paper by Henry Hitchcock, . . . . .	93
Paper by George A. Mercer, . . . . .	143
Address of E. J. Phelps, . . . . .	173
Report of Committee on Jurisprudence &c., . . . . .	193
Report of Committee on Legal Education &c., . . . . .	209
Treasurer's Report, . . . . .	237



Digitized by the Internet Archive  
in 2018 with funding from

This project is made possible by a grant from the Institute of Museum and Library Services as administered by the Pennsylvania Department of Education through the Office of Commonwealth Libraries

PROCEEDINGS OF THE SECOND ANNUAL MEETING  
OF THE  
AMERICAN BAR ASSOCIATION,

HELD IN THE  
Town Hall, Saratoga, N. Y., August 20th and 21st, 1879.

---

1. L. P. POLAND, Chairman of the Executive Committee, called the meeting to order about eleven o'clock A. M., on the twentieth of August, and introduced JAMES O. BROADHEAD, the President of the Association, who delivered the opening address. (*See Appendix.*)

2. The Association then proceeded to the election of members, and the following were duly elected, viz.:

ARKANSAS.

JOHN J. HORNER, P. O. THWEATT,  
J. M. MOORE.

CONNECTICUT.

LOREN P. WALDO, EDWARD W. SEYMOUR,  
LAFAYETTE S. FOSTER, HORACE CORNWALL,  
WILLIAM T. MINOR, ALVAN P. HYDE,  
JULIUS B. CURTIS, GILBERT W. PHILIPS,  
SHERMAN W. ADAMS.

DISTRICT OF COLUMBIA.

A. PORTER MORSE.

GEORGIA.

R. F. LYON, WALTER S. CHISHOLM,  
FRANK H. MILLER, R. N. ELY,  
HENRY JACKSON.

## AMERICAN BAR ASSOCIATION.

## ILLINOIS.—THOMAS HOYNE.

## INDIANA.

THOMAS A. HENDRICKS,  
JOSEPH E. McDONALD,  
JOHN M. BUTLER,  
BENJAMIN HARRISON,  
WM. H. H. MILLER,  
C. C. HINES,  
OSCAR B. HORD,  
NAPOLEON B. TAYLOR,  
F. RAND,  
EDWIN TAYLOR,  
F. WINTER,

JOHN M. WILSON,  
RALPH HILL,  
DAVID TURPIE,  
ALBERT G. PORTER,  
A. C. HARRIS,  
C. A. KORBLY,  
S. STANSIFER,  
JAMES J. BEST,  
ALLEN ZOLLARS,  
R. S. ROBERTSON,  
AZRO DYER,

JOSEPH A. S. MITCHELL.

## KENTUCKY.

WILLIAM PRESTON,  
ALFRED T. POPE,  
M. M. BENTON,  
J. Z. MOORE,

JAMES O'HARA,  
JOHN MASON BROWN,  
MALCOLM YEAMAN,  
JOHN W. FEIGHAN.

## LOUISIANA.

J. L. GAUDET,

JAMES McCONNELL,  
VICTOR OLIVIER.

## MAINE.

NATHAN WEBB,  
WM. L. PUTNAM,  
NATHAN CLEAVES,  
GEO. F. HOLMES,

JOSIAH H. DRUMMOND,  
JAMES D. FESSENDEN,  
A. P. GOULD,  
ORVILLE D. BAKER.

## MARYLAND.

JAMES B. GROOME,  
THALES S. LINTHICUM,

JOSEPH KENT ROBERTS, JR.,  
ROBERT R. BOARMAN.

## MASSACHUSETTS.

GEORGE MARSTON,  
WILLIAM H. CRAPO,  
THOMAS M. STETSON,  
CHARLES W. CLIFFORD,

WILLIAM H. FOX,  
JAMES M. MORTON,  
B. W. HARRIS,  
A. G. BULLOCK.

MISSOURI.—JOSEPH SHIPPEN.

NEW HAMPSHIRE.

HARRY BINGHAM,  
GEORGE A. BINGHAM,  
JOHN M. SHIRLEY,  
A. P. CARPENTER,  
WILLIAM S. LADD,

ALBERT S. WAIT,  
JEREMIAH SMITH,  
IRVING W. DREW,  
JOSEPH W. FELLOWS,  
E. B. S. SANBORN.

NEW JERSEY.

CORTLANDT PARKER,  
FREDK. H. TEESE,  
THOMAS N. MCCARTER,  
JAMES OLIVER CLARK,  
WILLIAM R. WEEKS,  
L. SPENCER GOBLE,  
THOMAS T. KINNEY,  
JACOB WEART,

HENRY S. WHITE,  
JOSEPH D. BEDLE,  
WASHINGTON B. WILLIAMS,  
ALEXANDER T. MCGILL, JR.,  
JAMES B. VREDENBURGH,  
BARKER GUMMERE,  
HENRY S. LITTLE,  
S. MEREDITH DICKINSON,

ROBERT S. WOODRUFF, JR.

NEW YORK.

AUGUSTUS SCHOONMAKER,  
GEORGE F. COMSTOCK,  
E. W. STOUGHTON,  
HENRY J. SCUDDER,  
JOHN E. WARD,  
WILLIAM C. WHITNEY,  
JOHN E. BURRILL,  
BENJAMIN D. SILLIMAN,  
CLIFFORD A. HAND,  
A. J. VANDERPOEL,  
STEPHEN P. NASH,  
JOSHUA M. VANCOTT,  
SIMON STERNE,  
ROBERT D. BENEDICT,  
JOHN N. WHITING,  
ELBRIDGE T. GERRY,

W. W. MCFARLAND,  
JAMES P. LOWREY,  
PETER B. OLNEY,  
ANDREW BOARDMAN,  
PLATT POTTER,  
SAML. W. JACKSON,  
JUDSON F. LANDON,  
W. B. FRENCH,  
ASHLEY D. L. BAKER,  
HORACE E. SMITH,  
JAMES M. DUDLEY,  
SHERMAN E. ROGERS,  
GEORGE B. HIBBARD,  
E. RANDOLPH ROBINSON,  
RALPH E. PRIME,  
EDGAR F. CULLEN,

LUTHER R. MARSH.

## OHIO.

HENRY STANBERRY,  
RUFUS P. RANNEY,  
SENECA O. GRISWOLD,  
RICHARD A. HARRISON,  
HENRY C. NOBLE,  
CHARLES H. SCRIBNER,  
ALPHONSO TAFT,  
JAMES MASON,  
ROBT. A. JOHNSON,  
HENRY F. PAGE,  
MILLS GARDNER,

S. C. CRAIGHEAD,  
JOHN A. McMAHON,  
GEORGE W. HOUCK,  
OSCAR F. MOORE,  
W. A. HUTCHINS,  
W. A. DOUGHERTY,  
JOHN J. BRAZEE,  
CHARLES MARTIN,  
WM. W. JOHNSON,  
M. M. GRANGER,  
W. T. PORTER,

EDWARD COLSTON.

## PENNSYLVANIA.

WM. HENRY RAWLE,  
GEORGE T. BISPHAM,  
J. SERGEANT PRICE,  
CHARLES H. PENNYPACKER,  
HENRY W. PALMER,  
NATHANIEL ELLMAKER,  
HUGH M. NORTH,  
ISAAC S. SHARP,  
ANDREW G. CURTIN,  
MALCOLM HAY,

WM. D. LUCKENBACH,  
A. R. BRUNDAGE,  
RICHARD VAUX,  
STANLEY WOODWARD,  
ROBERT E. MONAGHAN,  
JOSEPH J. LEWIS,  
WM. B. WADDELL,  
JOSEPH HEMPHILL,  
E. B. STURGES,  
WM. E. LITTLE,

W. N. SEIBERT.

## SOUTH CAROLINA.

J. W. BACOT,  
JOSEPH W. BARNWELL,  
W. H. BRAISLEY,  
B. R. BURNETT,  
THEODORE G. BARKER,  
JAMES B. CAMPBELL,  
WILMOT G. DESAUSSURE,

W. ST. JULIEN JEWETT,  
EDWARD MCCRADY, JR.,  
A. G. MAGRATH,  
JULIAN MITCHELL,  
C. H. SIMONTON,  
HENRY A. M. SMITH,  
AUGUSTINE T. SMYTHE,

G. R. WALKER.

## VERMONT.

H. H. POWERS,  
W. C. DUNTON,  
W. C. FRENCH,  
W. H. WALKER,

W. G. SHAW,  
E. H. POWELL,  
W. L. BURNAP,  
W. D. CRANE.

3. Anthony L. Knapp, of Springfield, Illinois, presented credentials as a delegate to this Association from the Illinois State Bar Association.

4. Azro Dyer and Joseph A. S. Mitchell, new members from Indiana, were also delegates from the Indiana State Bar Association.

Charles F. Manderson appeared as a delegate from the State Bar Association of Nebraska.

5. The Secretary, Edward Otis Hinkley, then presented his Report, as follows :

The proceedings of the last meeting have been printed, with the Constitution and a list of members and of officers appended. By-Laws have been adopted by the Executive Committee, and have also been printed ; likewise a circular notice of this second annual meeting, all which papers have been distributed among members.

The list of members contains 289 names, and 201 having been elected at this meeting, the whole number of members would be 490 ; there are, however, a few deaths and resignations, the exact number of which cannot now be stated. The Secretary has had occasion to correspond with a large number of persons, notifying officers and others, and has endeavored to fulfil the duties of his office.

6. The Treasurer presented his Report, which was read and accepted. (*See Appendix.*)

7. The Chairman of the Executive Committee, Judge Poland, reported that some changes had been made by the Committee in the By-Laws since they were printed, as follows :

In the order of exercises, after 2 (b), the following words are inserted, viz. : “ *Election of the Council.* ”

This change was made in order that the Council might be appointed as early as possible, because it is their duty to nominate all the officers of the Association, and for the same reason another change was made, thus :

To the 6th By-Law, the following words are appended, viz. :  
“ *Except the Council, whose term of office shall commence immediately upon their election.*”

In the 7th By-Law, after the word Committees, insert the words, “ *except the Committee on Publications,*” and at the end append the words, “ *The Committee on Publications shall be appointed on the first day of each meeting.*”

A 12th By-Law has been added, as follows :

“ *At any of the meetings of the Association, members of the bar of any foreign country, or of any state who are not members of this Association, may be admitted to the privileges of the floor during such meeting.*”

This Committee was requested, by a vote of the Association at its first annual meeting, to devise and report to this meeting measures for establishing close relations between this Association and the bar associations of the several states.

Your Committee, on consideration of the subject, were of opinion that one suitable measure for the purpose would be, to allow each state bar association to be represented at all meetings of this Association by delegates, with the privileges of membership. A By-Law to this effect was, therefore, framed, and is the fourth of those adopted by the Committee, which have been submitted to you in print.

We have also thought it would be advisable to forward copies of the proceedings and publications of this Association to the Secretary of each state bar association, and, unless otherwise directed, will see that this is hereafter done.

I have been also directed by the Committee to propose an amendment to the Constitution, a matter, perhaps, not strictly

within the duty of the Executive Committee. It may be advisable that the Executive Committee should be more permanent, and it was not apparent to us that there was any special importance in having the Executive Committee made up in any part of members of the Council, and we therefore submit this proposition to the Association :

To amend Article III. of the Constitution, by striking out the words in the 9th line, viz. : "*of the Council*," and I make a motion to that effect.

The motion was seconded by Rufus King, and the amendment was unanimously adopted, there being more than thirty members present.

8. Judge Poland then said :

One of the By-Laws that have been adopted by the Executive Committee and reported, provides for inviting any member of the bar of any foreign country, and, consistently with that provision, I move that Robert F. Hall, a member of the bar of the Province of Quebec, and President of the Bar Association of the District of St. Francis, in which he lives, be invited to a seat upon the floor, and to participate in these proceedings.

The motion was adopted, and Mr. Hall being present accepted the invitation.

9. The President then appointed the Committee on Publications. (*See List of Committees appended.*)

10. On motion of Mr. Baldwin, it was resolved, that the first business at the evening session should be the election of the Council.

11. The President then introduced Calvin G. Child, of Connecticut, who read a paper on "SHIFTING USES, FROM THE STANDPOINT OF THE NINETEENTH CENTURY."

12. On motion of Judge Poland, the meeting was adjourned at forty-five minutes after one o'clock, until seven P. M.

## EVENING SESSION.

---

13. The meeting having been called to order by the President,

Judge Poland said :

Agreeably to the motion made this forenoon, I now move that we proceed with the first business, and that the states be called in their order for nominations, from the several states, for members of the Council. The motion was adopted, and the members of the Council were elected. (*See List of Officers appended.*)

14. The President then introduced Henry Hitchcock, of Missouri, who read a paper on "THE INVIOABILITY OF TELEGRAMS."

15. The President then introduced George A. Mercer, of Georgia, who read a paper on "THE RELATIONSHIP OF LAW AND NATIONAL SPIRIT."

16. Judge Poland moved the following amendment to the Constitution, which was unanimously adopted, there being more than thirty members present :

Amend the first clause of Article IV. of the Constitution, so that it shall read as follows :

"All nominations for membership shall be made by the Local Council of the state to the bar of which the persons nominated belong. Such nominations must be transmitted, in writing, to the Chairman of the General Council, and approved by the Council, on vote by ballot.

“The General Council may also nominate members from  
“states having no Local Council.

“All nominations thus made, or approved, shall be reported  
“by the Council to the Association, and all whose names are  
“reported shall thereupon become members of the Association;  
“*Provided*, That if any member demands a vote upon any name  
“thus reported, the Association shall thereupon vote thereon  
“by ballot.”

The Association then adjourned until 10 A. M., on Thursday.

---

*Thursday, August 21, 1879, 10 A. M.*

17. The President called the meeting to order, and introduced Edward J. Phelps, of Vermont, who delivered the *Annual Address*. (*See Appendix*.)

18. William Allen Butler, of New York, Chairman of the Committee on Jurisprudence and Law Reform, read the Report of that Committee (*See Appendix*), which was received, and the Resolution thereto appended was adopted, as follows:

*Resolved*, That in the judgment of the Association, it is greatly to be desired that action be taken by the several states, by proper and concurrent legislation, to secure uniformity in the acknowledgment and authentication of deeds, and other instruments affecting real estate, and in the mode of executing and attesting wills, and to this end the several Local Councils of the Association are hereby directed to coöperate with the Committee on Jurisprudence and Law Reform, as the Committee may request and indicate, in the preparation of forms of acknowledgment, proof and authentication of such instruments and of regulations as to the execution and attestation of wills, with a view to securing such uniformity; the same to be reported by the Committee to the Association at its next annual meeting.

19. Rufus King, of Ohio, Chairman of the Committee on Judicial Administration and Remedial Procedure, asked the indulgence of the Association for one year, this course being rendered necessary by the death of Mr. Somerby, the Chairman of that Committee; the indulgence was thereupon granted.

20. Carleton Hunt, of Louisiana, Chairman of the Committee on Legal Education and Admissions to the Bar, then read the report of that Committee (*See Appendix*), which was received.

To this report were appended certain *Resolutions*, the adoption of which the Committee recommended, viz. :

*Resolved* (1), That the several state and local bar associations in the United States be respectfully requested to recommend and further the enactment of laws for assimilating throughout the union, on principles of comity, the standing of members of the bar, already admitted to practice in their own states, by admitting to equal rights and privileges, as practitioners of law in the courts of all the other states, those who have practiced for three years in the highest court of the state of which they are citizens.

*Resolved* (2), That the several state and other local bar associations be respectfully requested to recommend and further in their respective states, the maintenance, by public authority, of schools of law, provided with faculties of at least four well paid and efficient teachers, and whose diploma shall, upon being unanimously granted, after a full and fair written examination, be essential as a qualification for practicing law.

*Resolved* (3), That the said state and other local bar associations be respectfully requested to recommend and further in such law schools a general course of instruction, to be duly divided, for ordinary purposes, into studies and exercises of the first year, of the second year, and of the third year, including at least the following studies :

I. Moral and Political Philosophy.

II. The Elementary and Constitutional Principles of the Municipal Law of England, and herein,—

1st, Of the Feudal Law ;

2d, The Institutes of the Municipal Law generally ;

3d, The Origin and Progress of the Common Law.

III. The Law of Real Rights and Real Remedies.

IV. The Law of Personal Rights and Personal Remedies.

V. The Law of Equity.

VI. The Lex Mercatoria.

VII. The Law of Crimes and their Punishments.

VIII. The Law of Nations.

IX. The Maritime and Admiralty Law.

X. The Civil or Roman Law.

XI. The Constitution and Laws of the United States of America, and herein of the Jurisdiction and Practice of the Courts of the United States.

XII. Comparative Jurisprudence, and the Constitutions and Laws of the several States of the Union.

XIII. Political Economy.

*Resolved* (4), That the said state and other local bar associations be respectfully requested to recommend and further in such law schools, the requirement of attendance on at least the studies and exercises appointed for said course of three years, as a qualification for examination to be admitted to the bar.

The Resolutions were laid on the table, for the purpose of considering other matters.

21. Judge Poland presented the nominations by the Council, of Officers of the Association for the ensuing year.

22. The Council also nominated certain new members of the Association, and there being no objection to any one of them, they accordingly were duly elected, viz.:

## ALABAMA.

ALPHEUS BAKER,  
WALTER S. BRAGG,  
DAVID CLOPTON,

EDMUND W. PETERS,  
D. S. TROY,  
THOMAS H. WATTS.

## CALIFORNIA.—JOHN N. POMEROY.

## DISTRICT OF COLUMBIA.—M. F. MORRIS.

*A. J. Porter*

## INDIANA.—W. C. WILSON.

## KANSAS.—JOHN GUTHRIE.

## MAINE.

LEWIS BAKER,

CHARLES P. STETSON.

## MARYLAND.

JOHN HENRY KEENE,

ROBERT G. KEENE.

## MASSACHUSETTS.—NATHANIEL W. LADD.

## NEBRASKA.—J. M. WOOLWORTH.

## RHODE ISLAND.

CHARLES S. BRADLEY,

BENJAMIN F. THURSTON,

WILLIAM P. SHEFFIELD.

## VERMONT.

DANIEL ROBERTS,

B. B. SMALLEY,

H. H. WHEELER.

23. On motion of Mr. Baldwin, the following resolutions were adopted :

*Resolved* (1), That before the opening of each term of the Supreme Court of the United States, a Docket should be prepared by the clerk, at the public expense, and mailed to every lawyer who appears as attorney of record in any of the cases pending; such Docket to contain, not only the name and number of each case, with the names of the counsel, but also a brief minute of any interlocutory orders made, or pleas or motions filed therein.

*Resolved* (2), That the Committee on Judicial Administration and Remedial Procedure, and the Local Council for the District of Columbia, be a Joint Special Committee to procure the necessary legislation or orders to attain the object specified in the foregoing resolution.

24. On motion of Mr. Butler, the following resolution was adopted :

*Resolved*, That the thanks of the Association are hereby tendered to Messrs. Calvin G. Child, Henry Hitchcock, and George A. Mercer, for the able and interesting papers read by them; and to Mr. Edward J. Phelps, for his admirable address, delivered before the Association.

25. The officers nominated by the General Council were then all duly elected. (*See Appendix.*)

26. The following gentlemen of the State of New York were duly elected members of the Association :

C CHARLES S. BEAMAN,  
WILLIAM FULLERTON,  
ROBERT HALE,  
SAMUEL HAND,  
JOHN T. HOFFMAN,  
FRANCIS KERNAN,  
DELANCEY NICOLL,

AMASA J. PARKER,  
WHEELER H. PECKHAM,  
ALBERT STICKNEY,  
JOHN THOMPSON,  
MARTIN I. TOWNSEND,  
E. S. VAN WINKLE,  
HENRY WHEATON,

EVERETT P. WHEELER.

27. Mr. Hunt, of Louisiana, moved that the thanks of this Association be tendered to the President, Executive Committee, Secretary, Treasurer, and all the officers of the Association, for the public spirit with which they have brought about and conducted this meeting, for which the Association have reason to feel obliged.

Mr. Bristow, the President elect, put the motion, and it was unanimously adopted.

28. On motion of Mr. King, of Ohio,—

*Resolved*, That the Committee on Jurisprudence and Law Reform be requested to report at the next annual meeting of the Association, a synopsis of the laws of marriage and divorce in all the states and territories and District of Columbia, with such recommendations as they deem expedient for bringing about more uniformity in such legislation; and that they be authorized to employ such clerical assistance as may be necessary in this as well as the subject heretofore referred to them.

29. Mr. Hunt, Chairman of the Committee on Legal Education and Admissions to the Bar, moved that the report of that Committee be taken from the table, and that it be made the special order for the ensuing session.

Mr. Hitchcock, of Missouri, proposed as an amendment, that the Executive Committee provide a suitable place in the order of exercise for the discussion of the subject at the next session of the Association. The amendment was accepted and the motion was adopted.

30. Mr. Baldwin suggested that when the Local Councils were elected, Illinois and Iowa were omitted, and unless provision had been made, he moved the re-election of last year's Local Councils for those states. Adopted.

Thereupon the Association adjourned until the next annual meeting.

EDWARD OTIS HINKLEY,

*Secretary.*

## MEMORANDUM.



The Association gave a dinner to its members at the Grand Union Hotel on the evening of August 21st. Eighty-six members were present. Mr. Latrobe, of Maryland, presided. The following toasts were offered by the Presiding Officer, and responded to by members:

THE LEGAL PROFESSION,	-	CORTLANDT PARKER, New Jersey.
THE BENCH,	- - -	LA FAYETTE S. FOSTER, Connecticut.
THE RETIRING PRESIDENT,	-	JAMES O. BROADHEAD, Missouri.
THE NEW ADMINISTRATION,	-	BENJAMIN H. BRISTOW, New York.
THE AMERICAN BAR ASSOCIATION,	-	A. R. LAWTON, Georgia.
THE NATIONALITY OF THE AMERICAN BAR ASSOCIATION,		WILLIAM PRESTON, Kentucky.
THE KNOWLEDGE OF THE TITMOUSE AS TO THE GESTATION OF THE		
ELEPHANT,	- - -	ANTHONY Q. KEASBEY, New Jersey.
THE CANADA BAR,	- -	R. F. HALL, Sherbrooke, Canada.
THE COMMON LAW,	- - -	RICHARD VAUX, Pennsylvania.
THE BAR AS A CONSERVATIVE FORCE IN SOCIETY,		ROBERT OULD, Virginia.
THE PRACTICE OF THE PROFESSION,		RICHARD T. MERRICK, District of Columbia.
WOMAN AT THE BAR,	- -	CALVIN G. CHILD, Connecticut.

## CONSTITUTION.

---

### NAME AND OBJECT.

ARTICLE I.—This Association shall be known as “The American Bar Association.” Its object shall be to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the Union, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the American Bar.

### QUALIFICATIONS FOR MEMBERSHIP.

ARTICLE II.—Any person shall be eligible to membership of this Association who shall be, and shall, for five years next preceding, have been, a member in good standing of the Bar of any state, and who shall also be nominated as hereinafter provided.

### OFFICERS AND COMMITTEES.

ARTICLE III.—The following officers shall be elected at each annual meeting for the year ensuing:—A President (the same person shall not be elected President two years in succession); one Vice-President from each state; a Secretary; a Treasurer; a Council, consisting of one member from each state; the Council shall be a Standing Committee on nominations for office; an Executive Committee, to be composed of the Secretary and Treasurer, together with three members to be chosen by the Association, one of whom shall be chairman of the Committee.

The following Committees shall be annually appointed by the President for the year ensuing, and shall consist of five members each :

- On Jurisprudence and Law Reform ;
- On Judicial Administration and Remedial Procedure ;
- On Legal Education and Admissions to the Bar ;
- On Commercial Law ;
- On International Law ;
- On Publications ;
- On Grievances.

A majority of those members of any Committee, including the Council, who may be present at any meeting of the Association, shall constitute a quorum of such committee for the purposes of such meeting.

The Vice-President for each state, and not less than two other members from such state, to be annually elected, shall constitute a Local Council for such state, to which shall be referred all applications for membership from such state. The Vice-President shall be *ex officio* chairman of such Council.

#### ELECTION OF MEMBERS.

ARTICLE IV.—All nominations for membership shall be made by the Local Council of the state to the bar of which the persons nominated belong. Such nominations must be transmitted, in writing, to the Chairman of the General Council, and approved by the Council, on vote by ballot.

The General Council may also nominate members from states having no Local Council.

All nominations thus made, or approved, shall be reported by the Council to the Association, and all whose names are reported shall thereupon become members of the Association ; *Provided*, That if any member demands a vote upon any name thus reported, the Association shall thereupon vote thereon by ballot.

Several nominees, if from the same state, may be voted for upon the same ballot; and in such case placing the word "No" against any name or names upon the ticket, shall be deemed a negative vote against such name or names, and against those only. Five negative votes shall suffice to defeat an election.

ARTICLE V.—All members of the Conference adopting the Constitution, and all persons elected by them, upon the recommendation of the committee of five appointed by such Conference, shall become members of the Association, upon payment of the annual dues for the current year herein provided for.

#### BY-LAWS.

ARTICLE VI.—By-Laws may be adopted at any annual meeting of the Association, by a majority of the members present. It shall be the duty of the Executive Committee, without delay, to adopt suitable By-Laws, which shall be in force until rescinded by the Association.

#### DUES.

ARTICLE VII.—Each member shall pay five dollars to the Treasurer as annual dues, and no person shall be qualified to exercise any privilege of membership who is in default. Such dues shall be payable, and the payment thereof enforced, as may be provided by the By-Laws. Members shall be entitled to receive all publications of the Association free of charge.

#### ANNUAL ADDRESS.

ARTICLE VIII.—The President shall open each annual meeting of the Association with an address, in which he shall communicate the most noteworthy changes in statute law on points of general interest made in the several states, and by Congress during the preceding year. It shall be the duty of the member of the General Council from each State to report to the President, on or before the first day of May, annually, any such legislation in his state.

## ANNUAL MEETINGS.

ARTICLE IX.—This Association shall meet annually in the month of July or August, at such time and place as the Executive Committee may select, and those present at such meeting shall constitute a quorum.

## AMENDMENTS.

ARTICLE X.—This Constitution may be altered or amended by a vote of three-fourths of the members present at any annual meeting, but no such change shall be made at any meeting at which less than thirty members are present.

## CONSTRUCTION.

ARTICLE XI.—The word "*state*," wherever used in this Constitution, shall be deemed to be equivalent to *state*, *territory* and the *District of Columbia*.

## BY-LAWS.

---

### MEETINGS OF THE ASSOCIATION.

I.—The Executive Committee, at its first meeting after each Annual Meeting, shall select some person to make an address at the next Annual Meeting, and not exceeding six members of the Association to read papers.

II.—The order of exercises at the Annual Meeting shall be as follows.

- (a) Opening address of the President.
- (b) Nominations and Election of Members.
- (c) Election of the General Council.
- (d) Reports of Secretary and Treasurer.
- (e) Report of Executive Committee.
- (f) Reports of Standing Committees,
  - On Jurisprudence and Law Reform ;
  - On Judicial Administration and Remedial Procedure ;
  - On Legal Education and Admissions to the Bar ;
  - On Commercial Law ;
  - On International Law ;
  - On Publications ;
  - On Grievances.
- (g) Reports of Special Committees.
- (h) The Nomination of Officers.
- (i) Miscellaneous Business.
- (j) The Election of Officers.

The address, to be delivered by a person invited by the Executive Committee, shall be made at the morning session of the second day of the Annual Meeting.

The reading and delivering of essays and papers shall be on the same day, or at such other time as the Executive Committee may determine.

III.—No person shall speak more than ten minutes at a time, or more than twice on one subject.

A stenographer shall be employed at each Annual Meeting.

IV.—Each State Bar Association may annually appoint delegates, not exceeding three in number, to the next meeting of the Association; such delegates shall be entitled to all the privileges of membership at and during the said meeting.

V.—All papers read before the Association shall be lodged with the Secretary. The annual Address of the President, the Reports of Committees and all proceedings at the Annual Meeting shall be printed; but no other address made or paper read or presented shall be printed, except by order of the Committee on Publications.

#### OFFICERS AND COMMITTEES.

VI.—The terms of office of all Officers elected at any Annual Meeting shall commence at the adjournment of such meeting, except the Council, whose term of office shall commence immediately upon their election.

VII.—The President shall appoint all Committees, except the Committee on Publications, within thirty days after the Annual Meeting, and shall announce them to the Secretary; and the Secretary shall promptly give notice to the persons appointed. The Committee on Publications shall be appointed on the first day of each meeting.

VIII.—The Council and all Standing Committees shall meet on the day preceding each Annual Meeting, at the place where the same is to be held, at such hour as their respective chairmen shall appoint.

IX.—The Committee on Publications shall also meet within one month after each Annual Meeting, at such time and place as the chairman shall appoint.

X.—Special meetings of any committee shall be held at such times and places as the chairman thereof may appoint: reasonable notice shall be given by him to each member by mail.

#### ANNUAL DUES.

XI.—The annual dues shall be payable at the Annual Meeting, in advance; if any member neglects to pay them for any year at or before the next Annual Meeting, he shall cease to be a member. The Treasurer shall give notice of this By-Law within sixty days after each meeting, to all members in default.

XII.—At any of the meetings of the Association, Members of the Bar of any foreign country, or of any state who are not members of the Association, may be admitted to the privileges of the floor during such meeting.

PRESIDENT,  
BENJAMIN H. BRISTOW,  
*Of New York.*

SECRETARY,  
EDWARD OTIS HINKLEY,  
*No. 43 North Charles Street, Baltimore, Maryland.*

TREASURER,  
FRANCIS RAWLE,  
*No. 402 Walnut Street, Philadelphia, Pennsylvania.*

EXECUTIVE COMMITTEE,  
L. P. POLAND, *St. Johnsbury, Vermont*, Chairman,  
SIMEON E. BALDWIN, <sup>*New Haven*</sup>~~*Hartford*~~, *Connecticut*,  
WILLIAM A. FISHER, *Baltimore, Maryland.*

EX-OFFICIO.  
EDWARD OTIS HINKLEY, *Secretary*,  
FRANCIS RAWLE, *Treasurer.*

## COUNCIL.

---

<i>Arkansas,</i>	.	.	.	.	U. M. ROSE.
<i>Connecticut,</i>	.	.	.	.	ALVAN P. HYDE.
<i>District of Columbia,</i>	.	.	.	.	J. HUBLEY ASHTON.
<i>Georgia,</i>	.	.	.	.	GEORGE A. MERCER.
<i>Illinois,</i>	.	.	.	.	THOMAS HOYNE.
<i>Indiana,</i>	.	.	.	.	AZRO DYER.
<i>Kentucky,</i>	.	.	.	.	JAMES S. PIRTLE.
<i>Louisiana,</i>	.	.	.	.	CARLETON HUNT.
<i>Maine,</i>	.	.	.	.	ALMON A. STROUT.
<i>Maryland.</i>	.	.	.	.	SKIPWITH WILMER.
<i>Massachusetts,</i>	.	.	.	.	EDMUND H. BENNETT.
<i>Michigan,</i>	.	.	.	.	O'BRIEN J. ATKINSON.
<i>Mississippi,</i>	.	.	.	.	JOSEPH E. LEIGH.
<i>Missouri,</i>	.	.	.	.	JOSEPH SHIPPEN,
<i>Nebraska,</i>	.	.	.	.	CHARLES F. MANDERSON.
<i>New Hampshire,</i>	.	.	.	.	JOHN M. SHIRLEY.
<i>New Jersey,</i>	.	.	.	.	JOHN W. TAYLOR.
<i>New York,</i>	.	.	.	.	E. F. BULLARD.
<i>Ohio,</i>	.	.	.	.	WILLIAM T. MCCLINTOCK.
<i>Pennsylvania,</i>	.	.	.	.	THOMAS E. FRANKLIN.
<i>Vermont,</i>	.	.	.	.	LUKE P. POLAND.
<i>Virginia,</i>	.	.	.	.	ROBERT OULD.
<i>West Virginia,</i>	.	.	.	.	JOHN A. HUTCHINSON.

VICE-PRESIDENTS  
AND  
MEMBERS OF LOCAL COUNCILS.

---

ALABAMA.—Vice-President, THOMAS H. WATTS.

Local Council, D. S. TROY, DAVID CLOPTON.

ARKANSAS.—Vice-President, JOHN J. HORNER.

Local Council, JAMES C. TAPPAN, J. M. MOORE.

CALIFORNIA.—Vice-President, JOHN N. POMEROY.

CONNECTICUT.—Vice-President, ORIGEN S. SEYMOUR.

Local Council, HENRY C. ROBINSON, C. B. ANDREWS.

DISTRICT OF COLUMBIA.—Vice-President, H. H. WELLS.

Local Council, R. T. MERRICK, NATHANIEL WILSON.

DELAWARE.—Vice-President, ANTHONY HIGGINS.

GEORGIA.—Vice-President, ALEXANDER R. LAWTON.

Local Council, N. J. HAMMOND, L. N. WHITTLE.

ILLINOIS.—Vice-President, DAVID DAVIS.

Local Council, O. H. BROWNING, LYMAN TRUMBULL, G. KOERNER.

INDIANA.—Vice-President, THOMAS A. HENDRICKS.

Local Council, A. W. HENDRICKS, ASA IGLEHART,  
ROBERT S. TAYLOR.

IOWA.—Vice-President, W. G. HAMMOND.

Local Council, GEO. G. WRIGHT, OLIVER P. SHIRAS.

KENTUCKY.—Vice-President, WILLIAM PRESTON.

Local Council, JOHN W. STEVENSON, JOHN MASON  
BROWN.

LOUISIANA.—Vice-President, F. P. POCHÉ.

Local Council, THOMAS J. SEMMES, T. L. BAYNE.

MAINE.—Vice-President, NATHAN WEBB.

Local Council, WILLIAM PUTNAM, F. A. WILSON.

MARYLAND.—Vice-President, R. J. GITTINGS.

Local Council, A. LEO KNOTT, W. J. ROSS, HENRY  
STOCKBRIDGE, J. J. ALEXANDER.

MASSACHUSETTS.—Vice-President, WILLIAM GASTON.

Local Council, LEONARD A. JONES, FRANK GOODWIN.

MICHIGAN.—Vice-President, THOMAS M. COOLEY.

Local Council, ARCHIBALD McDOWELL, JOHN ATKIN-  
SON, EDWIN WILLETTS.

MISSISSIPPI.—Vice-President, LOCK E. HOUSTON.

Local Council, R. O. REYNOLDS, G. A. EVANS, T. C.  
CATCHINGS.

MISSOURI.—Vice-President, HENRY HITCHCOCK.

Local Council, JAMES O. BROADHEAD, EDW. C. KEHR,  
GEORGE W. BAILEY.

NEBRASKA.—Vice-President, JAMES M. WOOLWORTH.

Local Council, S. H. CALHOUN, CHAS. F. MANDERSON

NEW HAMPSHIRE.—Vice-President, GILMAN MARSTON.

Local Council, OSSIAN RAY, C. W. STANLEY.

NEW JERSEY.—Vice President, ABRAHAM GARRETSON.

Local Council, GARRET D. W. VROOM, WILLIAM E.  
POTTER, CHARLES BORCHERLING.

NEW YORK.—Vice-President, CLARKSON N. POTTER.

Local Council, WILLIAM A. BUTLER, JAMES M. DUDLEY, W. B. FRENCH.

OHIO.—Vice-President, RUFUS KING.

Local Council, GEO. HOADLY, STANLEY MATTHEWS, S. O. GRISWOLD, RUFUS P. RANNEY.

PENNSYLVANIA.—Vice-President, GEORGE W. BIDDLE.

Local Council, A. A. OUTERBRIDGE, HENRY GREEN, GEORGE SHIRAS, JR.

RHODE ISLAND.—Vice-President, CHARLES S. BRADLEY.

Local Council, BENJAMIN F. THURSTON, W. P. SHEFFIELD.

SOUTH CAROLINA.—Vice-President, HENRY E. YOUNG.

Local Council, W. H. BRAISLEY.

TENNESSEE.—Vice-President, WILLIAM F. COOPER.

Local Council, ALBERT T. McNEAL, B. M. ESTES.

VIRGINIA.—Vice-President, ROBERT OULD.

Local Council, W. J. ROBERTSON, LEGH R. PAGE.

VERMONT.—Vice-President, E. J. PHELPS.

Local Council, GUY C. NOBLE, CHARLES N. DAVENPORT.

## COMMITTEES.

---

### ON JURISPRUDENCE AND LAW REFORM.

WILLIAM ALLEN BUTLER, New York, N. Y.  
SIMEON E. BALDWIN, New Haven, Conn.  
EDWARD L. PIERCE, Boston, Mass.  
THOMAS J. SEMMES, New Orleans, La.  
HENRY HITCHCOCK, St. Louis, Mo.

### ON JUDICIAL ADMINISTRATION AND REMEDIAL PROCEDURE.

RUFUS KING, Cincinnati, O.  
GEORGE W. BIDDLE, Philadelphia, Pa.  
E. C. SPRAGUE, Buffalo, N. Y.  
WALTER Q. GRESHAM, Indianapolis, Ind.  
ALEXANDER R. LAWTON, Savannah, Georgia.

### ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR.

CARLETON HUNT, New Orleans, La.  
HENRY STOCKBRIDGE, Baltimore, Md.  
U. M. ROSE, Little Rock, Ark.  
GEORGE HOADLY, Cincinnati, O.  
EDMUND H. BENNETT, Taunton, Mass.

### ON COMMERCIAL LAW.

WILLIAM WALTER PHELPS, New York, N. Y.  
GEORGE A. MERCER, Savannah, Ga.  
JAMES T. MITCHELL, Philadelphia, Pa.  
JULIAN J. ALEXANDER, Baltimore, Md.  
LYMAN TRUMBULL, Chicago, Ill.

### ON INTERNATIONAL LAW.

WILLIAM M. EVARTS, New York, N. Y.  
THOMAS M. COOLEY, Ann Arbor, Mich.  
WILLIAM GASTON, Boston, Mass.  
JOHN W. STEVENSON, Covington, Ky.  
LEGH R. PAGE, Richmond, Va.

ON PUBLICATION.

EDWARD J. PHELPS, Burlington, Vt.  
JOHN C. DAY, Hartford, Conn.  
FRANCIS RAWLE, Philadelphia, Pa.  
A. Q. KEASBEY, Newark, N. J.  
GILMAN MARSTON, Exeter, N. H.

ON GRIEVANCES.

J. RANDOLPH TUCKER, Lexington, Va.  
RICHARD T. MERRICK, Washington, D. C.  
JOHN N. ROGERS, Davenport, Iowa.  
JAMES S. PIRTLE, Louisville, Ky.

## MEMBERS—AUGUST, 1879-80.

## ALABAMA.

---

BAKER, ALPHEUS . . . . .	Eufala.
BRAGG, WALTER S. . . . .	Montgomery.
CLOPTON, DAVID . . . . .	Montgomery.
PETTERS, EDMUND W. . . . .	Selma.
TROY, D. S. . . . .	Montgomery.
WATTS, THOMAS H. . . . .	Montgomery.

## ARKANSAS.

CARLTON, HERMON . . . . .	Pine Bluff.
HORNER, JOHN J. . . . .	Helena.
MOORE, J. M. . . . .	Little Rock.
ROSE, U. M. . . . .	Little Rock.
TAPPAN, JAMES C. . . . .	Helena.
THWEATT, P. O. . . . .	Helena.

## CALIFORNIA.

POMEROY, JOHN N. . . . .	San Francisco.
--------------------------	----------------

## CONNECTICUT.

ADAMS, SHERMAN W. . . . .	Hartford.
ANDREWS, CHARLES B. . . . .	Litchfield.
AVERILL, ROGER . . . . .	Danbury.
BALDWIN, SIMEON E. . . . .	New Haven.
BREWSTER, LYMAN D. . . . .	Danbury.
CHILD, CALVIN G. . . . .	Stamford.
CORNWALL, HORACE, . . . . .	Hartford.
CURTIS, JULIUS B. . . . .	Stamford.
DAY, JOHN C. . . . .	Hartford.
FOSTER, LAFAYETTE S. . . . .	Norwich.
HAMERSLEY, WILLIAM . . . . .	Hartford.
HUBBARD, RICHARD D. . . . .	Hartford.

## CONNECTICUT—Continued.

HYDE, ALVAN P.	.	.	.	.	Hartford.
INGERSOLL, CHARLES R.	.	.	.	.	New Haven.
KINGSBURY, FREDERICK J.	.	.	.	.	Waterbury.
MCCURDY, CHARLES J.	.	.	.	.	Lyme.
MINOR, WILLIAM T.	.	.	.	.	Stamford.
PARDEE, HENRY E.	.	.	.	.	New Haven.
PHILIPS, GILBERT W.	.	.	.	.	Putnam.
PLATT, JOHNSON T.	.	.	.	.	New Haven.
ROBINSON, HENRY C.	.	.	.	.	Hartford.
RUSSELL, TALCOTT H.	.	.	.	.	New Haven.
SEYMOUR, EDWARD W.	.	.	.	.	Litchfield.
SEYMOUR, ORIGEN S.	.	.	.	.	Litchfield.
WALDO, LOREN P.	.	.	.	.	Hartford.
WAYLAND, FRANCIS	.	.	.	.	New Haven.
WILLCOX, W. F.	.	.	.	.	Deep River.
WOODRUFF, GEORGE M.	.	.	.	.	Litchfield.
WOODWARD, ASA B.	.	.	.	.	Norwalk.

## DELAWARE.

HIGGINS, ANTHONY	.	.	.	.	Wilmington.
------------------	---	---	---	---	-------------

## DISTRICT OF COLUMBIA.

ASHTON, J. HUBLEY	.	.	.	.	Washington.
COX, WALTER S.	.	.	.	.	Washington.
MELOY, WILLIAM A.	.	.	.	.	Washington.
MERRICK, RICHARD T.	.	.	.	.	Washington.
MORRIS, M. F.	.	.	.	.	Washington.
MORSE, A. PORTER	.	.	.	.	Washington.
WELLS, H. H.	.	.	.	.	Washington.
WILSON, NATHANIEL	.	.	.	.	Washington.

## FLORIDA.

JONES, CHARLES W.	.	.	.	.	Pensacola.
-------------------	---	---	---	---	------------

## GEORGIA.

CHISHOLM, WALTER S.	.	.	.	.	Savannah.
ELY, ROBERT N.	.	.	.	.	Atlanta.
HAMMOND, N. J.	.	.	.	.	Atlanta.
HOOKE, JAMES J.	.	.	.	.	Atlanta.
JACKSON, HENRY	.	.	.	.	Atlanta.

## GEORGIA—Continued.

LAWTON, ALEXANDER R.	.	.	.	Savannah.
LYON, R. F.	.	.	.	Macon.
MERCER, GEORGE A.	.	.	.	Savannah.
MILLER, FRANK H.	.	.	.	Augusta.
WHITTLE, L. N.	.	.	.	Macon.

## ILLINOIS.

BROWNING, O. H.	.	.	.	Quincy.
DAVIS, DAVID	.	.	.	Bloomington.
HOYNE, THOMAS	.	.	.	Chicago.
KOERNER, GUSTAVE	.	.	.	Belleville.
MASON, EDWARD G.	.	.	.	Chicago.
TRUMBULL, LYMAN	.	.	.	Chicago.

## INDIANA.

BEST, JAMES J.	.	.	.	Waterloo.
BICKNELL, GEORGE A.	.	.	.	New Albany.
BUTLER, JOHN M.	.	.	.	Indianapolis.
DAVIDSON, THOMAS F.	.	.	.	Covington.
DURBIN, GREENE	.	.	.	Versailles.
DYER, AZRO	.	.	.	Evansville.
FAIRBANKS, CHARLES W.	.	.	.	Indianapolis.
FISHBACK, W. P.	.	.	.	Indianapolis.
FRAZER, JAMES S.	.	.	.	Warsaw.
GRESHAM, WALTER Q.	.	.	.	Indianapolis.
HARRIS, A. C.	.	.	.	Indianapolis.
HARRISON, BENJAMIN,	.	.	.	Indianapolis.
HENDRICKS, A. W.	.	.	.	Indianapolis.
HENDRICKS, THOMAS A.	.	.	.	Indianapolis.
HILL, RALPH	.	.	.	Indianapolis.
HINES, C. C.	.	.	.	Indianapolis.
HORD, OSCAR B.	.	.	.	Indianapolis.
IGLEHART, ASA	.	.	.	Evansville.
KORBLY, C. A.	.	.	.	Madison.
LOWRY, R.	.	.	.	Fort Wayne.
MCDONALD, JOSEPH E.	.	.	.	Indianapolis.
MILLER, WILLIAM H. H.	.	.	.	Indianapolis.
MITCHELL, JOSEPH A. S.	.	.	.	Goshen.
PORTER, ALBERT G.	.	.	.	Indianapolis.
RAND, F.	.	.	.	Indianapolis.
ROBERTSON, R. S.	.	.	.	Fort Wayne.

## INDIANA—Continued.

STANSIFER, S.	Columbus.
TAYLOR, EDWIN	Indianapolis.
TAYLOR, NAPOLEON B.	Indianapolis.
TAYLOR, R. S.	Fort Wayne.
TURPIE, DAVID	Indianapolis.
WILSON, JOHN M.	Indianapolis.
WILSON, W. C.	La Fayette.
WINTER, F.	Indianapolis.
ZOLLARS, ALLEN	Fort Wayne.

## IOWA.

HAMMOND, WILLIAM G.	Iowa City.
ROGERS, JOHN N.	Davenport.
SHIRAS, OLIVER P.	Dubuque.
WRIGHT, GEORGE G.	Des Moines.

## KANSAS.

GUTHRIE, JOHN	Topeka.
---------------	---------

## KENTUCKY.

BECK, JAMES B.	Lexington.
BENTON, M. M.	Covington.
BROWN, JOHN MASON	Louisville.
FEIGHAN, JOHN W.	Henderson.
MOORE, J. Z.	Owensboro.
O'HARA, JAMES	Covington.
PIRTLE, JAMES S.	Louisville.
POPE, ALFRED T.	Louisville.
PRESTON, WILLIAM	Lexington.
RUCKER, HENRY,	Paris.
STEVENSON, JOHN W.	Covington.
WILLSON, A. E.	Louisville.
YEAMAN, MALCOLM	Henderson.

## LOUISIANA.

ACKLEN, JOSEPH H.	Pattersonville.
BAYNE, THOMAS L.	New Orleans.
BERMUDY, EDWARD	New Orleans.
BREAUX, G. A.	New Orleans.
CAMPBELL, JOHN A.	New Orleans.
CLARK, THOMAS ALLEN	New Orleans.
DENIS, HENRY	New Orleans.

## LOUISIANA—Continued.

EUSTIS, J. B.	New Orleans.
FINNEY, JOHN	New Orleans.
GAUDET, J. L.	St. James.
GIBSON, R. L.	New Orleans.
GILLMORE, THOMAS	New Orleans.
GRIMA, ALFRED	New Orleans.
HERRON, ANDREW S.	Baton Rouge.
HUNT, CARLETON	New Orleans.
HUNT, RANDALL	New Orleans.
JAMES, CHARLES E.	New Orleans.
JONAS, B. F.	New Orleans.
KNOBLOCK, HENRY CLAY	Lafourche.
LEGENDRE, EMILE	St. James.
MCCONNELL, JAMES	New Orleans.
MERRICK, EDWIN T.	New Orleans.
MILLER, HENRY C.	New Orleans.
MOORE, ISAIAH D.	Lafourche.
NICHOLS, FRANCIS T.	New Orleans.
NEW, JOHN H.	New Orleans.
OLIVIER, VICTOR	New Orleans.
POCHÉ, F. P.	St. James.
PUGH, EDWARD W.	Ascension.
RACE, GEORGE W.	New Orleans.
RICHARDSON, ROBERT	Monroe.
SEMMES, THOMAS J.	New Orleans.
SIMS, R. NICHOLAS	Ascension.
SPOFFORD, HENRY M.	New Orleans.
WINCHESTER, J. RICHARD.	St. James.
WICKLIFFE, ROBERT C.	Bayou Sara.

## MAINE.

BAKER, ORVILLE D.	Augusta.
BAKER, LEWIS	Bangor.
CLEAVES, NATHAN	Portland.
DRUMMOND, JOSIAH H.	Portland.
FESSENDEN, JAMES D.	Portland.
FRYE, WILLIAM P.	Lewistown.
GOULD, A. P.	Thomaston.
HOLMES, GEORGE F.	Portland.
PUTNAM, WILLIAM L.	Portland.
STETSON, CHARLES P.	Bangor.
STROUT, A. A.	Portland.
WEBB, NATHAN	Portland.
WILSON, F. A.	Bangor.

## MARYLAND.

ALEXANDER, JULIAN J.	Baltimore.
BEASTEN, CHARLES JR.	Baltimore.
BOARMAN, ROBERT R.	Towsontown.
BONAPARTE, CHARLES J.	Baltimore.
FISHER, WILLIAM A.	Baltimore.
GITTINGS, RICHARD J.	Baltimore.
GROOME, JAMES B.	Elkton.
HAGNER, A. B.	Annapolis.
HINKLEY, EDWARD OTIS	Baltimore.
KEENE, JOHN HENRY	Baltimore.
KEENE, ROBERT G.	Baltimore.
KNOTT, A. LEO	Baltimore.
LATROBE, JOHN H. B.	Baltimore.
LINTHICUM, THALES S.	Baltimore.
MARSHALL, CHARLES	Baltimore.
MATTHEWS, R. STOCKETT	Baltimore.
McINTOSH, DAVID G.	Towsontown.
ROBERTS, JOSEPH K., Jr.	Upper Marlboro
ROSS, WILLIAM J.	Frederic City.
SHARP, GEORGE M.	Baltimore.
STOCKBRIDGE, HENRY	Baltimore.
VENABLE, RICHARD M.	Baltimore.
WILMER, SKIPWITH	Baltimore.

## MASSACHUSETTS.

BALDWIN, G. W.	Boston.
BELL, C. V.	Lawrence.
BENNETT, EDMUND H.,	Taunton.
BOND, D. W.	Northampton.
BULLOCK, A. G.	Worcester.
CLIFFORD, CHARLES W.	New Bedford.
CRAPO, WILLIAM H.	New Bedford.
FOX, WILLIAM H.	Taunton.
GASTON, WILLIAM	Boston.
GOODWIN, FRANK	Boston.
HARRIS, B. W.	E. Bridgewater.
HEMENWAY, ALFRED	Boston.
HURD, FRANCIS W.	Boston.
HYDE, HENRY D.	Boston.
JONES, LEONARD A.	Boston.
KNOWLTON, M. P.	Springfield.
LADD, NATH. W.	Boston.
LAMB, S. O.	Greenfield.
MARSTON, GEORGE	New Bedford.

## MASSACHUSETTS—Continued.

MORTON, JAMES M.	.	.	.	.	Fall River.
MUZZEY, HENRY W.	.	.	.	.	Boston.
PIERCE, EDWARD L.	.	.	.	.	Boston.
RANNEY, A. A.	.	.	.	.	Boston.
RICHARDSON, DANIEL A.	.	.	.	.	Lowell.
STETSON, THOMAS M.	.	.	.	.	New Bedford.
SWIFT, M. G. B.	.	.	.	.	Fall River.
THAYER, JAMES B.	.	.	.	.	Cambridge.
TRAIN, CHARLES R.	.	.	.	.	Boston.

## MICHIGAN.

ATKINSON, JOHN	.	.	.	.	Detroit.
ATKINSON, O'BRIEN J.	.	.	.	.	Port Haven.
COOLEY, THOMAS M.	.	.	.	.	Ann Arbor.
MCDOWELL, ARCHIBALD	.	.	.	.	Bay City.
WILLETTS, EDWIN	.	.	.	.	Monroe.

## MISSISSIPPI.

CALHOUN, S. S.	.	.	.	.	Canton.
CATCHINGS, T. C.	.	.	.	.	Vicksburg.
CHALMERS, H. H.	.	.	.	.	Panola.
CLIFTON, OLIVER	.	.	.	.	Jackson.
EVANS, GEORGE A.	.	.	.	.	Columbus.
GEORGE, J. Z.	.	.	.	.	Jackson.
HARRIS, N. E.	.	.	.	.	Vicksburg.
HARRISON, JAMES T.	.	.	.	.	Columbus.
HOUSTON, LOCK E.	.	.	.	.	Aberdeen.
JOHNSTON, FRANK	.	.	.	.	Canton.
LEIGH, JOSEPH E.	.	.	.	.	Columbus.
MATHEWS, BEVERLY	.	.	.	.	Columbus.
REYNOLDS, R. O.	.	.	.	.	Aberdeen.
SIMS, W. H.	.	.	.	.	Columbus.
SYKES, E. O.	.	.	.	.	Aberdeen.
TUCKER, W. F.	.	.	.	.	Oaktown.
YOUNG, UPTON	.	.	.	.	Vicksburg.

## MISSOURI.

BAILEY, GEORGE W.	.	.	.	.	St. Louis.
BLISS, P.	.	.	.	.	Columbus.
BROADHEAD, JAMES O.	.	.	.	.	St. Louis.
COLLIER, M. DWIGHT	.	.	.	.	St. Louis.
COMINGO, A.	.	.	.	.	Independence.

## MISSOURI—Continued.

HENDERSON, J. B.	.	.	.	.	St. Louis.
HITCHCOCK, HENRY	.	.	.	.	St. Louis.
KEHR, EDWARD C.	.	.	.	.	St. Louis.
KRUM, JOHN M.	.	.	.	.	St. Louis.
ORRICK, JOHN C.	.	.	.	.	St. Louis.
SHIPPEN, JOSEPH	.	.	.	.	St. Louis.
TODD, ALBERT	.	.	.	.	St. Louis.
WADE, WILLIAM P.	.	.	.	.	St. Louis.
WITHROW, JAMES E.	.	.	.	.	St. Louis.

## NEBRASKA.

ABBOTT, N. C.	.	.	.	.	Lincoln.
AMORY, GEO. K.	.	.	.	.	Lincoln.
CALHOUN, S. H.	.	.	.	.	Nebraska City.
GALEY, S. B.	.	.	.	.	Lincoln.
HALL, D. G.	.	.	.	.	Lincoln.
LAIRD, JAMES	.	.	.	.	Lincoln.
MANDERSON, CHARLES F.	.	.	.	.	Omaha.
MARQUETT, T. M.	.	.	.	.	Lincoln.
POUND, S. B.	.	.	.	.	Lincoln.
WOOLWORTH, J. M.	.	.	.	.	Omaha.

## NEW HAMPSHIRE.

BINGHAM, GEORGE A.	.	.	.	.	Littleton.
BINGHAM, HARRY	.	.	.	.	Littleton.
CARPENTER, A. P.	.	.	.	.	Bath.
DREW, IRVING W.	.	.	.	.	Lancaster.
EASTMAN, SAMUEL C.	.	.	.	.	Concord.
FELLOWS, JOSEPH W.	.	.	.	.	Manchester.
HATCH, A. H.	.	.	.	.	Portsmouth.
LADD, WILLIAM S.	.	.	.	.	Lancaster.
MARSTON, GILMAN	.	.	.	.	Exeter.
RAY, OSSIAN	.	.	.	.	Lancaster.
SANBORN, E. B. S.	.	.	.	.	Franklin.
SMITH, JEREMIAH	.	.	.	.	Dover.
SHIRLEY, JOHN M.	.	.	.	.	Andover.
STANLEY, C. W.	.	.	.	.	Manchester.
WAIT, ALBERT S.	.	.	.	.	Newport.

## NEW JERSEY.

ABEEL, GUSTAVUS N.	.	.	.	.	Newark.
BEDLE, JOSEPH D.	.	.	.	.	Jersey City.
BORCHERLING, CHARLES	.	.	.	.	Newark.
CLARK, JAMES OLIVER	.	.	.	.	Newark.
DICKINSON, S. MEREDITH	.	.	.	.	Trenton.
GARRETSON, A. Q.	.	.	.	.	Jersey City.
GOBLE, L. SPENCER	.	.	.	.	Newark.
GUMMERE, BARKER	.	.	.	.	Trenton.
KEASBEY, A. Q.	.	.	.	.	Newark.
KINNEY, THOMAS T.	.	.	.	.	Newark.
LITTLE, H. S.	.	.	.	.	Trenton.
MCCARTER, LUDLOW	.	.	.	.	Newark.
MCCARTER, THOMAS N.	.	.	.	.	Newark.
MCGILL, ALEXANDER T., Jr.	.	.	.	.	Jersey City.
PARKER, CORTLANDT	.	.	.	.	Newark.
POTTER, WILLIAM E.	.	.	.	.	Bridgetown.
TAYLOR, JOHN W.	.	.	.	.	Newark.
TEESE, FRED'K H.	.	.	.	.	Newark.
VREDENBURGH, JAMES B.	.	.	.	.	Jersey City.
VROOM, GARRET D. W.	.	.	.	.	Trenton.
WEART, JACOB	.	.	.	.	Jersey City.
WEEKS, WILLIAM R.	.	.	.	.	Newark.
WHITE, HENRY S.	.	.	.	.	Jersey City.
WILLIAMS, WASHINGTON B.	.	.	.	.	Jersey City.
WOODRUFF, ROBERT S., Jr.	.	.	.	.	Trenton.

## NEW YORK.

BAKER, ASHLEY D. L.	.	.	.	.	Gloversville.
BEAMAN, CHARLES S.	.	.	.	.	New York.
BENEDICT, ROBERT D.	.	.	.	.	New York.
BLAKE, CHARLES F.	.	.	.	.	New York.
BOARDMAN, ANDREW	.	.	.	.	New York.
BRISTOW, BENJAMIN H.	.	.	.	.	New York.
BULLARD, E. F.	.	.	.	.	Saratoga.
BURCHARD, NATHAN	.	.	.	.	Brooklyn.
BURNETT, HENRY L.	.	.	.	.	New York.
BURRILL, JOHN E.	.	.	.	.	New York.
BUTLER, WM. ALLEN	.	.	.	.	New York.
COMSTOCK, GEORGE F.	.	.	.	.	Syracuse.
CULLEN, EDGAR F.	.	.	.	.	Brooklyn.
DUDLEY, JAMES M.	.	.	.	.	Johnstown.
DURFEE, H. R.	.	.	.	.	Palmyra.
EATON, DORMAN B.	.	.	.	.	New York.

## NEW YORK—Continued.

EATON, SHERBURNE B.	.	.	.	.	New York.
EMOTT, JAMES	.	.	.	.	New York.
EVARTS, WILLIAM M.	.	.	.	.	New York.
FORSTER, GEORGE H.	.	.	.	.	New York.
FRENCH, W. B.	.	.	.	.	Saratoga.
FROST, CALVIN	.	.	.	.	Peekskill.
FULLERTON, WILLIAM	.	.	.	.	New York.
GERRY, ELBRIDGE T.	.	.	.	.	New York.
HALE, MATTHEW	.	.	.	.	Albany.
HALE, ROBERT	.	.	.	.	Elizabethtown.
HAND, CLIFFORD A.	.	.	.	.	New York.
HAND, SAMUEL	.	.	.	.	Albany.
HIBBARD, GEORGE B.	.	.	.	.	Buffalo.
HOFFMAN, JOHN T.	.	.	.	.	New York.
JACKSON, SAMUEL W.	.	.	.	.	Schenectady.
KERNAN, FRANCIS	.	.	.	.	Utica.
LANDON, JUDSON F.	.	.	.	.	Schenectady
LOWREY, JAMES P.	.	.	.	.	New York.
LYON, W. A.	.	.	.	.	New York.
MACFARLAND, W. W.	.	.	.	.	New York
MARSH, LUTHER R.	.	.	.	.	New York.
MATTHEWS, ALBERT	.	.	.	.	New York.
MITCHELL, EDWARD	.	.	.	.	New York.
NASH, STEPHEN P.	.	.	.	.	New York.
NELSON, HOMER A.	.	.	.	.	Poughkeepsie.
NICOLL, DELANCEY	.	.	.	.	New York.
OLNEY, PETER B.	.	.	.	.	New York.
PARKER, AMASA J.	.	.	.	.	Albany.
PECKHAM, WHEELER H.	.	.	.	.	New York.
PERKINS, J. B.	.	.	.	.	Rochester.
PHELPS, WM. WALTER	.	.	.	.	New York.
POND, A.	.	.	.	.	Saratoga.
PORTER, JOHN K.	.	.	.	.	New York.
POTTER, CLARKSON N.	.	.	.	.	New York.
POTTER, PLATT	.	.	.	.	Schenectady.
PRIME, RALPH E.	.	.	.	.	Yonkers.
RICHARDSON, CHARLES A.	.	.	.	.	Canandaigua.
ROBINSON, E. RANDOLPH	.	.	.	.	New York.
ROGERS, SHERMAN E.	.	.	.	.	Buffalo.
RUGER, WILLIAM C.	.	.	.	.	Schenectady.
SAYRES, GILBERT	.	.	.	.	Brooklyn.
SCHOONMAKER, AUGUSTUS, JR.	.	.	.	.	Albany.
SCUDDER, HENRY J.	.	.	.	.	New York.

## NEW YORK—Continued.

SHEPARD, ELLIOTT F.	New York.
SILLIMAN, BENJAMIN D.	New York.
SMITH, HENRY	Albany.
SMITH, HORACE E.	Johnstown.
SPRAGUE, E. C.	Buffalo.
STERNE, SIMON	New York.
STICKNEY, ALBERT	New York.
STOUGHTON, E. W.	New York.
SULLIVAN, ALGERNON S.	New York.
THOMPSON, JOHN	Poughkeepsie.
TOWNSEND, MARTIN I.	Troy.
VAN COTT, JOSHUA M.	New York.
VANDERPOEL, A. J.	New York.
VAN WINKLE, E. S.	New York.
WARD, JOHN E.	New York.
WHEATON, HENRY	Poughkeepsie.
WHEELER, EVERETT P.	New York.
WHITING JOHN N.	New York.
WHITNEY, WILLIAM C.	New York.
WILLIS, BENJ. A.	New York.
WINSLOW, JOHN	New York.

## OHIO.

BALDWIN, CHARLES C.	Cleveland.
BRAZEE, JOHN J.	Lancaster.
BRICE, C. S.	Lima.
COLSTON, EDWARD	
CRAIGHEAD, S. C.	Dayton.
DEWITT, E. L.	Columbus.
DOUGHERTY, W. A.	Lancaster.
EVANS, N. W.	Portsmouth.
GARDNER, MILLS	Washington C.H.
GRANGER, M. M.	Janesville.
GRISWOLD, SENECA O.	Cleveland.
HACKERDORN, W. E.	Lima.
HARRISON, RICHARD A.	Columbus.
HOADLY, GEORGE	Cincinnati.
HOUCK, GEORGE W.	Dayton.
HUTCHINS, W. A.	Portsmouth.
IRVINE, JAMES	Lima.
JOHNSON, EDGAR M.	Cincinnati.
JOHNSON, ROBERT A.	Cincinnati.

## OHIO—Continued.

JOHNSON, WILLIAM W.	.	.	.	.	Ironton.
KING, RUFUS	.	.	.	.	Cincinnati.
MARTIN, CHARLES	.	.	.	.	Lancaster.
MASON, JAMES	.	.	.	.	Cleveland.
MATTHEWS, STANLEY	.	.	.	.	Cincinnati.
McCLINTOCK, W. T.	.	.	.	.	Chillicothe.
McMAHON, JOHN A.	.	.	.	.	Dayton.
MEEK, BASIL	.	.	.	.	Clyde.
MERRILL, N.	.	.	.	.	Wauseon.
MOORE, OSCAR F.	.	.	.	.	Portsmouth.
MORRIS, S. W.	.	.	.	.	Ironton.
NOBLE, HENRY C.	.	.	.	.	Columbus.
PAGE, HENRY F.	.	.	.	.	Circleville.
PORTER, W. T.	.	.	.	.	Cincinnati.
RANNEY, RUFUS P.	.	.	.	.	Cleveland.
SCRIBNER, CHARLES H.	.	.	.	.	Toledo.
SHAW, R. K.	.	.	.	.	Marietta.
STANBERRY, HENRY	.	.	.	.	Cincinnati.
TAFT, ALPHONSO	.	.	.	.	Cincinnati.
YOUNG, W. D.	.	.	.	.	Ripley.

## PENNSYLVANIA.

ARMSTRONG, WM. H.	.	.	.	.	Williamsport.
BIDDLE, GEORGE W.	.	.	.	.	Philadelphia.
BISPHAM, GEORGE T.	.	.	.	.	Philadelphia.
BREWSTER, BENJ. H.	.	.	.	.	Philadelphia.
BRIDGES, S. A.	.	.	.	.	Allentown.
BRUNDAGE, A. R.	.	.	.	.	Wilkesbarre.
CURTIN, ANDREW G.	.	.	.	.	Bellefonte.
DALLAS, GEORGE M.	.	.	.	.	Philadelphia.
ELLMAKER, NATHANIEL	.	.	.	.	Lancaster.
FRANKLIN, THOMAS E.	.	.	.	.	Lancaster.
GREEN, HENRY	.	.	.	.	Easton.
HAY, MALCOLM	.	.	.	.	Pittsburgh.
HEMPHILL, JOSEPH	.	.	.	.	West Chester.
LEWIS, JOSEPH J.	.	.	.	.	West Chester.
LITTLE, WILLIAM E.	.	.	.	.	Tunkhannock.
LUCKENBACH, W. D.	.	.	.	.	Allentown.
McMURTRIE, RICHARD C.	.	.	.	.	Philadelphia.
MITCHELL, JAMES T.	.	.	.	.	Philadelphia.
MONAGHAN, ROBERT E.	.	.	.	.	West Chester.
NORTH, HUGH M.	.	.	.	.	Columbia.

## PENNSYLVANIA—Continued.

OUTERBRIDGE, ALBERT A.	.	.	.	Philadelphia.
PALMER, HENRY W.	.	.	.	Wilkesbarre.
PENNYPACKER, CHARLES H.	.	.	.	West Chester.
PERKINS, SAMUEL C.	.	.	.	Philadelphia.
PRICE, J. SERGEANT	.	.	.	Philadelphia.
RAWLE, FRANCIS	.	.	.	Philadelphia.
RAWLE, WM. HENRY	.	.	.	Philadelphia.
SEIBERT, W. N.	.	.	.	New Bloomfield.
SHARP, ISAAC S.	.	.	.	Philadelphia.
SHIRAS, GEORGE, JR.	.	.	.	Pittsburgh.
SHOEMAKER, L. D.	.	.	.	Wilkesbarre.
STURGIS, E. B.	.	.	.	Scranton.
VAUX, RICHARD	.	.	.	Philadelphia.
WADDELL, WILLIAM B.	.	.	.	West Chester.
WOODWARD, STANLEY	.	.	.	Wilkesbarre.

## RHODE ISLAND.

BRADLEY, CHARLES S.	.	.	.	Providence.
SHEFFIELD, WILLIAM P.	.	.	.	Newport.
THURSTON, BENJ. F.	.	.	.	Providence.
VANZANDT, C. C.	.	.	.	Newport.

## SOUTH CAROLINA.

BACOT, J. W.	.	.	.	Charleston.
BARKER, THEODORE G.	.	.	.	Charleston.
BARNWELL, JOSEPH W.	.	.	.	Charleston.
BRAISLEY, W. H.	.	.	.	Charleston.
BURNETT, B. R.	.	.	.	Charleston.
CAMPBELL, JAMES B.	.	.	.	Charleston.
DESAUSSURE, WILMOT G.	.	.	.	Charleston.
JEWETT, W. ST. JULIEN	.	.	.	Charleston.
MAGRATH, A. G.	.	.	.	Charleston.
MCCRADY, EDWARD JR.	.	.	.	Charleston.
MITCHELL, JULIAN	.	.	.	Charleston.
SIMONTON, C. H.	.	.	.	Charleston.
SMITH, HENRY A. M.	.	.	.	Charleston.
SMYTHE, AUGUSTINE T.	.	.	.	Charleston.
WALKER, G. R.	.	.	.	Charleston.
YOUNG, HENRY E.	.	.	.	Charleston.

## TENNESSEE.

COOPER, WILLIAM F.	.	.	.	Nashville.
ESTES, BEDFORD M.	.	.	.	Memphis.
MCNEAL, ALBERT T.	.	.	.	Bolivar.

## VERMONT.

BELDEN, HENRY C.	St. Johnsbury.
BROMLEY, J. B.	Castleton.
BURNAP, W. L.	Burlington.
CRANE, W. D.	Newport.
DAVENPORT, CHARLES N.	Brattleboro.
DUNTON, W. C.	Rutland.
FRENCH, WARREN C.	Woodstock.
GARDNER, ABRAHAM B.	Bennington.
HINCKLEY, LYMAN G.	Chelsea.
JOHNSON, WILLIAM E.	Woodstock.
NOBLE, GUY C.	St. Albans.
PAUL, NORMAN	Woodstock.
PHELPS, E. J.	Burlington.
POLAND, LUKE P.	St. Johnsbury.
POWELL, E. H.	Richford.
POWERS, H. H.	Morrisville.
PROUT, JOHN	Rutland.
ROBERTS, DANIEL	Burlington.
SHAW, W. G.	Burlington.
SMALLEY, B. B.	Burlington.
STEVENS, HIRAM F.	St. Albans.
STEWART, JOHN W.	Middlebury.
TYLER, JAMES M.	Brattleboro.
VEAZEY, WHEELOCK G.	Rutland.
WALKER, ALDACE F.	Rutland.
WALKER, W. H.	Ludlow.
WHEELER, H. H.	Jamaica.

## VIRGINIA.

DANIEL, J. W.	Lynchburg.
HAMILTON, ALEXANDER	Petersburg.
OULD, ROBERT	Richmond.
PAGE, LEGH R.	Richmond.
PAYNE, WILLIAM H.	Warrentown.
ROBERTSON, WILLIAM J.	Charlottesville.
STILES, ROBERT	Richmond.
TUCKER, J. RANDOLPH	Lexington.
WALTON, MOSES	Woodstock.

## WEST VIRGINIA.

BOGGESE, CALEB	Clarksburg.
HUTCHINSON, JOHN A.	Parkersburg.
JACKSON, J. B.	Parkersburg.



---

---

# APPENDIX.

---

---



ADDRESS  
OF  
JAMES O. BROADHEAD,  
PRESIDENT OF THE ASSOCIATION.

---

GENTLEMEN OF THE ASSOCIATION:—By the eighth article of the Constitution of our Association, it becomes my duty at this annual meeting “to communicate the most *noteworthy* changes “in the statute law on points of general interest, made in the “several states and by Congress during the preceding year.”

It is also made the duty of the member of the General Council from each state to report to the President, on or before the first day of May, annually, any such legislation in his state.

Inasmuch as only twenty-one states were represented in the General Council, and as but few of the members have made reports, it became necessary for me to look to other sources of information for the facts necessary to be communicated by me under the requirements of the Constitution. The secretaries of state of many of the states have kindly furnished me with copies of the Session Acts of the legislatures which have been in session during the last year.

Many of the states hold biennial sessions of the legislature, so that in some of them there has been no legislation since the last meeting of our Association, or to use legal phraseology, since the last continuance (*puis darrein continuance*).

In giving the “noteworthy changes in statute law on points of general interest” I have not undertaken to give, except in some instances, changes which are new merely to the state

adopting them, but mainly those which are new to the legislation of the country, for the obvious reason that a different course would make my communication too long, and for the further reason that the course that I have adopted is in accordance with a fair construction of the duties imposed upon me by our Constitution.

Whilst, therefore, having to exercise my own judgment as to what are noteworthy changes in the statute laws of the different states, I may not embrace all which, in the opinion of others, come under that head, and may, on the other hand, allude to some laws which might properly be left out. I have endeavored to be accurate in my statements in regard to such matters of legislation as in my opinion come properly within the purview of my duty.

#### ARKANSAS.

By an Act of the Arkansas legislature, approved February 27, 1879, all laws making counties corporations, and authorizing them to sue and be sued, are repealed. The Act further provides that all persons having demands against any county shall present the same to the county court of the county. From the judgment of the county court an appeal may be taken, and if the judgment of the county court is reversed the judgment of reversal shall be certified to the county court, which shall thereupon enter the judgment of the superior court as its own. When the county has a cause of action, suit may be brought by the state to the use of the county.

By an Act approved March 17, 1879, it is provided that in cases of sales of property under mortgages and deeds of trust the property to be sold shall first be appraised by appraisers appointed by the nearest justice of the peace, and if it does not sell for two-thirds of its appraised value then it must be offered again for sale not less than sixty days thereafter, if the property

be personal, and not less than one year thereafter if it be real. At such second offering the property shall be sold for whatever it will bring, without reference to the appraisement. But in the case of lands the mortgagee may still redeem at any time within a year from the day of sale, by paying the amount at which they were sold, with ten per cent. interest thereon, and the costs of sale. But this Act does not apply to sales of property for the purchase money thereof.

#### CALIFORNIA.

The State of California holds biennial sessions of the legislature, and there has been no session since our last meeting. But in that state a convention was held during the last year of delegates chosen to form a new constitution. The constitution framed by the convention was submitted to the people and adopted by a very decided popular majority in May last. This constitution contains some provisions entirely new to the profession, and as they have attracted much public attention, I have thought it not inappropriate to allude to them, although they do not, strictly speaking, come under the head of statute laws.

Constitutional law, as heretofore understood in our American system, embraces those general rules which determine the limits of administrative authority, and circumscribe the action of the government in relation to the constituent personal elements of the state—in other words, it is a law for the political authority of the state. The powers granted, the powers expressly denied, and the declaration of rights reserved to the individuals who compose the state—are all limitations upon the authority of the government, and whilst it cannot be denied that the people of any state may, under our American system, through what are called constitutional conventions, make rules to govern individuals in their relations to each other and to the state as members of the community, yet it has been thought best for the interest of every citizen, and for the cause of civil liberty

itself, that his rights of person and of property, and his relation to others as well as to the state, should, under the limitations above referred to, be controlled by laws made by a government composed of several departments, or of several bodies, each to some extent being a check upon the other; because the will of an unchecked majority may in times of great popular excitement degenerate into a despotism more odious and more oppressive than that of a single tyrant. We have in this country a common law of liberty which is higher even than written constitutions, and which demands not only that all the powers of government should be divided into three departments, but that the legislative department itself should be composed of more than one man, or one body of men; each having powers independent of the other. Hence it is that the law-making power has been vested in two houses, and that their will is also subject to a certain extent to be checked by the executive department of the government.

A more dangerous proposition could hardly be advanced than that one body of men should have the power to make all the laws, and it does not help the matter to say that a body of men so empowered has been chosen by a majority of the people of the state; for that really would be to deny to the minority all rights, except such as the majority choose to give them, whereas in a just government each citizen is entitled to the same protection with every other.

This subject belongs to the science of jurisprudence in its broadest sense. And as in the very nature of things the doctrine cannot be enforced by any legal sanctions, it must be established and maintained by an enlightened public sentiment. I allude to it here, because of late years the constitutional conventions of many states have in their action departed very widely from this most salutary principle, and none of them more so than the convention which framed the constitution of California.

I am not disposed to impugn the wisdom of the provisions to

which reference will be made, if they appeared as acts of ordinary legislation ; but it seems to me that many of them are out of place in a state constitution.

It is often the case that in seeking for something better we lose the good which we have ; and it may be that in attempting to curb the power of overgrown monopolies, or to eradicate evils which have grown up in the administration of state affairs, a precedent has been set which in the end will endanger the cause of civil liberty.

This new constitution of California provides that each stockholder of a corporation or joint stock association shall be personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder, as the amount of stock owned by him bears to the whole amount of the subscribed capital stock ; and that the directors and trustees of corporations and joint stock companies shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of the corporation during the term of office of the director or trustee.

The legislature is not authorized to extend any franchise or charter, nor to remit the forfeiture of any franchise or charter of a corporation now existing, or which shall hereafter exist, under the laws of the state.

No corporation is authorized to issue stock or bonds except for money paid, labor done, or property actually received ; and all fictitious increase of stock or indebtedness is declared to be void.

The cumulative system of voting for directors of corporations is provided for to the exclusion of every other mode, except that members of co-operative societies, formed for agricultural, mercantile and manufacturing purposes, may vote in manner prescribed by law.

A corporation may be sued in the county where the contract is made or is to be performed, or where the obligation or lia-

bility arises or the breach occurs, or in the county where the principal place of business of the corporation is situated.

Railroad companies are required to receive and transport each other's passengers, tonnage and cars, without delay or discrimination.

No president, director, officer, agent or employee of any railroad or canal company shall be interested directly or indirectly in the furnishing of material or supplies to the company, or in the business of transportation as a common carrier of freight or passengers over the road or canal owned, leased, controlled or worked by the company—except to the extent of his ownership of stock therein.

No railroad company or other common carrier shall combine or make any contract with the owners of any vessel that leaves port or makes port in the state, or with any common carrier, by which combination or contract the earnings of the one doing the carrying are to be shared by the others not doing the carrying. And whenever a railroad corporation shall, for the purpose of competing with any other common carrier, lower its rates for transportation of passengers or freight, from one point to another, such reduced rates shall not be again raised or increased from such standard without the consent of the governmental authority, in which shall be vested the powers to regulate fares or freights.

Provision is made for the election of three commissioners of transportation, who have full power and are required to establish rates of charges for the transportation of passengers or freight by railroad or other transportation companies, and to publish the same, from time to time, with such changes as they may make. Any failure to conform to the established rates of transportation on the part of a transportation company shall subject the company to a fine not exceeding twenty thousand dollars; and any officer or employee of a company who shall demand or receive rates in excess of those established by the com-

mission shall be fined not exceeding five thousand dollars and imprisoned not exceeding one year.

In regard to taxation, it is amongst other things provided that land and the improvements thereon shall be separately assessed, and that cultivated and uncultivated land of the same quality and similarly situated shall be assessed at the same value.

It also provided that a mortgage, deed of trust, contract or obligation by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, and except as to railroads or quasi public corporations, in case of debt so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of the security shall be assessed and taxed to the owner of the security in the county where the property is situated.

The tax levied is made a lien upon the property and the security, and may be paid by either party; if paid by the owner of the security, the amount of the tax shall become a part of the debt secured, and if the tax on the security is paid by the owner of the property, it shall constitute to that extent a payment of the debt secured.

Every contract by which a debtor is obliged to pay any tax or assessment on money loaned, or on any mortgage, deed of trust or other lien, shall, as to any interest specified therein, or as to such tax or assessment, be null and void.

The right to collect rates or compensation for the use of water supplied to any county, city or town or the inhabitants thereof, is declared to be a franchise, and cannot be exercised except by authority of and in the manner prescribed by law.

No corporation now existing, or that may hereafter be formed, under the laws of the state, shall employ, directly or indirectly, in any capacity, any Chinese or Mongolian, nor shall they be employed in any state, county, municipal, or other public work.

The legislature is required to pass laws prohibiting the introduction of Chinese into the state after the adoption of the Constitution.

It is declared that no native of China shall enjoy the elective franchise. And the convention, in their address to the people of the state, say that this provision is introduced to guard against a possible change in the naturalization laws admitting Chinese to citizenship, and that it was necessary to exclude all natives of China in order to avoid the prohibition contained in the fifteenth amendment, which declares that "The right of citizens of the United States to vote shall not be denied or abridged by any state on account of race, color, or previous condition of servitude."

It is difficult to apprehend how the prohibition contained in the fifteenth amendment is avoided by declaring beforehand to the United States that if the Chinese are permitted by the naturalization laws to become citizens, they shall nevertheless not enjoy the elective franchise. This attempt to repeal the fifteenth amendment will not, in my judgment, stand the test of judicial scrutiny. If they had said in the constitution that no man wearing a queue should enjoy the elective franchise, the prohibition might have been avoided—because the fifteenth amendment to the constitution says nothing about queues—but it does protect all races and all colors when they become citizens. In connection with this subject it may not be out of place to refer to a case tried during the last month, in which Justice Field, of the Supreme Court, whilst holding the United States Circuit Court in San Francisco, decided a question of some interest which arose under the provisions of an ordinance of the city of San Francisco.

The state had passed a law limiting the number of persons who might reside or lodge in a room or tenement having a capacity of so many cubic feet, and a violation of the provision of this law subjected the party to imprisonment in the county jail. A Chinaman in San Francisco was convicted of violating

the law and sentenced to imprisonment in the county jail. The authorities of the city of San Francisco passed an ordinance providing that all persons confined in the jail of the city should have their hair cut off within one inch of their heads.

The sheriff, in obedience to the ordinance, cut off the queue of the Chinaman, and he brought suit against the sheriff for damages. The complaint was demurred to, and the U. S. Circuit Court, Judge Field presiding, overruled the demurrer, holding that the act of the sheriff was unauthorized and a trespass; that the ordinance of the city was void; that the city under its charter was not authorized to pass such an ordinance; and second, that it was a cruel and unusual punishment and in violation of the constitution of the United States.

All contracts for the sale of shares of the capital stock of any corporation or association on margin or to be delivered at a future day shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction.

In civil actions three-fourths of a jury may render a verdict.

The provisions of the constitution are declared to be mandatory and prohibitory, unless by express words they are declared to be otherwise.

The Supreme Court of the state consists of one chief justice and six associate justices. The state is divided into two judicial departments, and the court may sit in departments or in banc.

The chief justice is required to assign three of the associate justices to each of the departments, which assignment may be changed from time to time, the justices being competent to sit in either department. Each department shall have the power to hear and determine causes.

The chief justice is required to apportion the business to each department, and may in his discretion order any cause before the court to be heard in banc. No judgment of a

department shall be final until the expiration of thirty days unless approved by the chief justice in writing, with the concurrence of two associate justices. Within the period of thirty days, unless so approved, a court in banc may be called, either by four associate justices or by the chief justice, for the hearing of any particular cause; the chief justice is authorized to convene the court in banc at any time.

Before drawing their salaries the justices of the Supreme Court and the judges of the superior courts are required to make and file an affidavit that no case remains undecided in their courts which has been submitted for ninety days.

Many of these provisions of the constitution of California partake of the character of ordinary acts of legislation; they are in fact laws or ordinances adopted without the concurrence of the legislative and executive departments of the government, and yet operating directly upon the individual.

#### CONNECTICUT.

The State of Connecticut has adopted a mode of procedure in courts of justice similar in its general features to that now in force in twenty states and seven territories. The object being: First, to abolish (with certain exceptions) the various forms of civil actions, and allow the suitor to come into court with a simple complaint, stating in plain language his real grievance; second, to permit the concurrent administration of law and equity by one and the same court, and in the same course of procedure.

An Act has also been passed declaring "That every tramp shall be punished by imprisonment in the state prison not more than one year."

Tax liens may be foreclosed in the manner provided by law for the foreclosure of mortgages of real estate, and the court may limit the time of redemption or order the sale of the property.

## GEORGIA.

The most important law passed by the Georgia Legislature is an Act authorizing the issue of state bonds to redeem the outstanding indebtedness of the state falling due. They are coupon bonds payable to bearer, and issued in sums of not less than five nor more than one hundred dollars, and in no event to be sold for less than par. They bear four per cent. interest, and are payable in six years at the office of the state treasurer; the interest is payable on the 1st of January of each year, the bonds to be engraved on the best bank-note paper, and of a particular dimension, as fixed by the Act. They are being readily bought up, and will pass as bank-notes. The question has been raised as to whether they come within the provision of the Federal Constitution against the emission of bills of credit. This Act was approved December 14, 1878. There is an Act approved December 16, 1878, providing for the probate of foreign wills, where the testator has died in another state, leaving property in the State of Georgia disposed of by said will. The courts of ordinary of the several counties may take proof of the will, and if no person resident of the state has been appointed executor, may issue letters of administration with the will annexed.

And also an Act to authorize common carriers who have transported freight to destination, and are unable to deliver the same in six months, to sell the same at public auction for cash, after publication in a newspaper for four weeks, and to deposit the proceeds of the sale in a state or national bank to be selected by the carrier. Perishable articles may be sold at short notice. Approved December 16, 1878.

## ILLINOIS.

The State of Illinois, by an Act approved May 7, 1879, provided that no real estate should be sold by virtue of any power of sale contained in a mortgage, deed of trust or other convey-

ance in the nature of a mortgage, executed after the taking effect of the Act, but that all such instruments should be foreclosed in the manner provided for foreclosing mortgages containing no power of sale, and by judgment of a court of competent jurisdiction.

By another Act, approved May 29, 1879, it is provided that conductors of railroad trains, and the captain or master of any steamboat carrying passengers, within the jurisdiction of the state, shall be invested with police powers while on duty on their respective trains or boats.

#### MASSACHUSETTS.

The most important Act of a general nature passed by the legislature of this state is an Act approved April 23, 1879, providing a remedy by suit for those having claims against the commonwealth.

The causes to be tried in the same manner in all respects as suits at common law—and if there is a final decision in favor of the claimant, the chief justice of the superior court shall certify the amount found due, with costs, to the governor, who is authorized to draw his warrant for the amount on the treasurer and receiver general.

By another Act, approved March 21, 1879, it is provided that whenever a person arrested on criminal process has been ordered to recognize with sureties for his appearance, he may, instead of giving securities, give his personal recognizance and deposit with the clerk or justice of the court the amount of bail which he is ordered to furnish.

#### MISSISSIPPI.

The State of Mississippi has passed a very stringent law against the carrying of concealed weapons.

Also providing a summary mode of trying cases of contested elections for county officers before a justice of the peace,

with the right of appeal to the Circuit Court when the case is to be tried *de novo*. The verdict of the jury determines who is entitled to the commission.

#### MISSOURI.

The last session of the Missouri legislature was the revising session; the revised statutes have not yet been published, and do not take effect until the first of November next, except such Acts as by the provisions therein contained take effect at a different time.

There are a very few Acts of a general nature which take effect before the first of November; amongst them are the following:

By an Act approved April 26, 1879, it was provided that any person being a candidate for election to any office of honor, trust or profit in the state, who shall promise to discharge the duties of the office for a sum less than the salary, fees or emoluments as fixed by the laws of the state; or to pay back any portion of the salary, fees or emoluments, as an inducement to voters at such election, shall, on conviction, be deemed guilty of a misdemeanor, and shall be fined not less than fifty nor more than five hundred dollars, or imprisoned in the county jail not less than ten days nor more than six months, or by both fine and imprisonment, and shall forfeit the office to which he shall have been elected. A spirit of economy had induced the people of some of the counties to elect men to office who agreed to serve for less than the lawful fees or salary, and this law is a reproof of such action.

By an Act approved March 9, 1879, it is provided that no tax shall be assessed, levied or collected in the several counties of the state except the state tax and tax necessary to pay the funded or bonded debt of the state, the tax for current county expenditures and for schools—except under certain limitations and conditions prescribed in the Act, which are as follows:

Whenever the county court of a county is satisfied that there exists a necessity for the assessment, levy and collection of other taxes than those first enumerated, they shall request the prosecuting or county attorney to present a petition to the Circuit Court of the county, or judge in the vacation, setting forth the reasons why such tax should be levied and collected—and the Circuit Court or judge, being satisfied of the necessity for such tax and that the levy and collection of the same will not conflict with the Constitution and laws of the state, shall, by order, direct the county court to levy and collect the tax.

And the judges of the county court are prohibited, under penalty, from assessing, levying or collecting any tax other than those first enumerated, without an order from the Circuit Court, obtained in the manner above described.

This Act was intended to avoid the process of the federal courts requiring the county courts to levy and collect taxes to pay judgments rendered against counties on their bonded indebtedness—there being a conflict in the decisions of the state and federal courts as to the validity of certain county bonds, and as to the power of the counties to issue them.

The United States Circuit Courts for the districts of Missouri, Judges Dillon, Krekle, and Treat, have decided this Act of the Missouri legislature to be unconstitutional and void, as impairing the obligations of contracts, by impairing the remedy in force when the contract was made.

#### OHIO.

By an Act of the General Assembly of Ohio, approved March 27, 1875, provision was made for the appointment by the governor of three commissioners, to revise and consolidate the statute laws of the state, and it is declared that in performing this duty the commissioners “shall bring together all the “statutes, and parts of statutes, relating to the same matter, “omitting redundant and obsolete enactments, and such as have “no influence on existing rights or remedies, making alterations

“to reconcile contradictions, supply omissions and amend imperfections in the original acts, so as to reduce the general statutes into as precise and comprehensive a form as is consistent with clear expression of the will of the general assembly—rejecting all ambiguous and equivocal words, and all tautology and circuitous phraseology.” They are also required to arrange the laws under suitable titles, with reference to the original Acts from which they are compiled, and to make foot notes of the decisions of the Supreme Court upon the same.

The commissioners have been engaged for four years in the work, and it has just been completed, and is to be published in two volumes by the first of December next.

But few Acts of a general nature have been passed by the last general assembly, and none of them particularly noteworthy, except an Act approved March 6, 1879, providing that a court from which any execution or order of sale has issued shall, upon notice and motion of the officer or interested party, punish as for contempt any purchaser of real property failing to pay the purchase money therefor.

#### PENNSYLVANIA.

The State of Pennsylvania, at the last session of its legislature, enacted but few laws of a general nature which are particularly noteworthy.

An Act approved April 30, 1879, provides for the punishment of tramps by imprisonment for a term not exceeding twelve months.

By another Act attorneys are entitled to a writ of error from the Supreme Court in cases of proceedings against them for unprofessional conduct.

By an Act approved June 11, 1879, it is provided that when a wife has been deserted by her husband, she is authorized to bring suit against her husband, or any one else, without the intervention of a trustee or next friend.

By another Act approved June 11, 1879, it is provided that judgment debtors, or other persons having knowledge, may be examined under oath for the discovery of property subject to execution, after the issuance of an execution and a return of no property found.

TEXAS.

In Texas the bell-punch law has been adopted, to take effect on the 1st of October, 1879.

And by an Act approved April 2, 1879, entitled "An Act to suppress lawlessness and crime, and to organize a force for that purpose," the governor is authorized to organize a company of twenty-five men, besides their officers, who are to be armed and equipped, and subsisted by the state; they are vested with certain police powers, and authorized to arrest persons charged with crime; they are to be governed by the rules and regulations of the United States Army, and the articles of war, so far as the same may be applicable.

By an Act approved April 21, 1879, it is provided "that no deed, mortgage, contract, bond for title or other written instrument relating to land, shall be registered or recorded, unless it is shown by recitals in such instruments whether the grantor was married or single at the time he acquired his interest in the land; if married, the name of the husband or wife; whether the husband or wife is dead; whether the land is separate or community land of the grantor, and whether the grantee is single or married, and if married, the name of the husband or wife."

On the 28th of July, 1876, an Act was approved providing for the appointment of five commissioners to revise and digest the laws of the state. They made report of their work on the 1st of January, 1879. It was approved. I have not been able to see a copy of the digest, but I may state that the civil code goes into effect on the first of September, 1879. The penal

code and the code of criminal procedure went into effect on the 24th of July last.

#### VERMONT.

Vermont has passed a law providing for taxing the deposits of savings banks, savings institutions, and trust companies. the tax is to be paid by the companies on account of the depositors.

Also, an Act approved January 1, 1879, providing for mortgages of personal property.

This is the first chattel mortgage law that ever existed in Vermont.

Provision has been made by law for the appointment of two commissioners to revise, redraft, compile, consolidate and arrange in methodical order, the public statutes of the state.

As to some of the states I have not been able to obtain access to the laws passed during the last year. In others, no laws have been passed which have been deemed worthy of special mention, and of the states which hold biennial sessions it so happens that in nearly all of them no session of the legislature was held during the last year.

#### ACTS OF CONGRESS.

An Act to establish a national board of health, to consist of seven members, to be appointed by the president, with the advice of the senate, and one medical officer of the army, one of the navy, one of the marine hospital service, and one officer from the department of justice, whose duty shall be to obtain information upon all matters affecting the public health ; to advise the several departments of the government, the executives of the several states, and the commissioners of the District of Columbia, on all questions submitted to them, or whenever, in the opinion of the board, such advice may tend to the preservation and improvement of the public health.

The Academy of Science is requested to co-operate with them, and they are to report at the next session of Congress a plan for a national public health organization. Approved March 3, 1879.

A joint resolution was passed appropriating \$50,000 to pay expenses incurred in investigating the origin and causes of epidemic diseases, especially yellow fever and cholera, and the best method of preventing their introduction into the United States.

An appropriation was made of \$250,000 to be set apart as a perpetual fund for the purpose of aiding the education of the blind in the United States, through the American Printing House for the Blind, by Act approved March 3, 1879.

Also an Act was passed at the late session admitting certain women to practise before the Supreme Court of the United States.

Also, an Act providing for taking criminal cases to the Circuit Court from the District Court, by writ of error, where the sentence is imprisonment, or fine and imprisonment, and the fine exceeds the sum of \$300.

One of the provisions of the last census Act, enacted March 9, 1879, provides, that if any state or territory shall, by its officers, and according to the rules and forms prescribed by the Act of Congress, take a semi-decennial census, the United States government will pay fifty per cent. of the cost.

And, now, gentlemen of the association, having, in a very imperfect manner, completed the special task assigned me, I have only a few words to say in reference to the general objects of the association as indicated by the wisdom of those who formed it.

We have undertaken to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the Union, uphold the honor of the profession

of the law, and encourage cordial intercourse among the members of the American bar.

If we shall prove ourselves equal to this undertaking, we will deserve the gratitude not only of the present but of the coming generations.

It has been said by an eminent English writer that "the whole story of law—as the story of every other department of human life—is the story of human error, but also the story of truth and resistance to error, not to say of triumph over it. It is by virtue of good laws and not of the bad, that states have progressed and nations continue to live ; and it is because the vast bulk of the law in all countries, even the worst governed, has done more to secure human freedom than to impair it, that civilization has progressed as far as it has."

In securing the adoption of good laws, the members of our profession, as long as they have maintained its honor, have always exercised a greater influence than all other classes in the community combined. Whilst not legislators themselves, they have much to do in directing the wheels of legislation.

From the nature of their calling it becomes their duty to watch the operation of all laws, whether they result from positive legislation or custom, and endeavor to improve them in the interest of humanity. Individual effort may accomplish much, but concerted action will accomplish more.

Public opinion is in this country the source of all laws, whether they appear in the form of customs which arise from the common consent of a people in a community—and which always exist before there is any written law on the subject to which they relate—or from statutes which are enacted by their representatives who are authorized to make laws.

In no country where the English language is spoken can the supreme political authority long persist in counteracting the will of the bulk of the population, no matter what may be the form of government.

But public opinion is so often wrong—the turbulence of human passions and the promptings of individual interest so often urge men to violate the principles of right in the passage of unjust laws, even in the best regulated societies, that untiring effort and unceasing vigilance are necessary to maintain truth and establish justice on a firm foundation. Efforts at social reform, political convulsions and domestic insurrections agitate the sea of public sentiment until the tempestuous waves threaten to sweep away, and do often sweep away, the barriers which protect individual right.

John Stuart Mill has well said: “That in the world of law  
“no less than in the physical world every commotion and conflict  
“of the elements has left its mark behind in some breach or irregularity of the state; every struggle which ever rent the  
“bosom of society is apparent in the disjointed condition of the  
“part of the field of law which covers the spot; nay the very  
“traps and pit-falls which one contending party set for another  
“are still standing, and the teeth, not of hyenas only, but of  
“foxes and all cunning animals are imprinted on the curious  
“remains found in these antediluvian caves.” (Essay on Bentham.)

It is the business of those who have studied the science of human rights, whether they be on the bench, at the bar, in the social circle, or in the halls of legislation, to see that public sentiment springs from a pure fountain and flows in an unobstructed channel, and that the laws adopted in pursuance of its mandates shall secure to each citizen the fulness of individual existence, and impose so much restraint only upon each as is necessary for the good of all.

## PAPER

READ BY

CALVIN G. CHILD.

---

*Shifting Uses, from the Stand-point of the Nineteenth Century.*

MR. PRESIDENT AND GENTLEMEN:—By the courtesy of the Executive Committee, the duty has been assigned me of reading an essay before you, upon a subject connected with the objects of this Association: They are stated in the first article of the Constitution to be “the advancement of the science of jurisprudence; the promotion of the administration of justice and uniformity of legislation throughout the Union; the upholding the honor of the profession of the law; and encouragement of cordial intercourse among the members of the American Bar.”

Within this by no means narrow range, I hope to confine myself in addressing you upon the subject of “Shifting Uses, from the Stand-point of the Nineteenth Century.”

Appreciating highly the favor of the committee, whose goodwill has manifested itself in so complimentary a manner, I am yet somewhat at a loss how to proceed, and feel that *in limine* I must bespeak your kind consideration and friendly criticism of this, the first essay before the American Bar Association—it is for me to show the way, to open a path, to lead out, as it were, the first company in the regiment on this our first dress parade, and were I not assured of your kindly greeting, that modesty, which is one of the graces of our profession, might well cause me to hesitate before advancing farther.

There is some degree of embarrassment in selecting one's own subject. The barrister's brief suggests antagonism, and a retainer usually presupposes an adversary; but, in choosing a topic for an essay, there is no opposition to encounter, except such as one chooses to create—you can give an opinion and dissent therefrom, making your reasons for each, after the manner of all courts, equally convincing; you can render a verdict and set it aside with perfect composure and the utmost irresponsibility; you become, in short, an involuntary imitator of Mr. Toots, conducting his imaginary business correspondence with unknown mercantile firms, while you vainly search for a feigned issue. I am, however, materially aided in my choice by the position assigned me among the essayists, for, as in all well regulated institutions, it is the invariable custom to deliver the salutatory, if not in an unknown tongue, at least in unfamiliar speech; hence, to a certain extent, my theme is indicated in advance; and, as on our return to our Alma Mater we listen with intent faces to the Greek address, or follow, with enthusiasm, the Latin oration, even in the marvellous pronunciation of the Continental school, yet, if put to the discovery our Greek may limit itself to “*Τὸν δ' ἀπαμβρόμενος προσέφη πολυμήτις Ὀδύσσευς,*” and a translation be required when our brother, newly graduated, illustrates agency by “*Ke farkit per ahliume farkit per say;*” so, in addressing you upon “Shifting Uses,” I follow the wholesome precedent of suggesting a topic concerning which we can all look wise, and about which few know more than their fellows.

Please bear in mind that this proceeding is entirely *ex parte*, and that although I may have to refer to Henry the Eighth, to do justice to my subject, yet I have brought the present century into immediate juxtaposition. Should I perchance wander from a beaten path, I yet hope to keep myself within constitutional limits.

In the year 1536 the English Parliament, apparently troubled in its mind as to encroachments upon the common law, enacted

the Statute of Uses and Wills, the preamble to which contained, among other clauses, the following :

“Whereas by the common law of this realm, lands, tenements, and hereditaments be not devisable by testament nor ought to be transferred from one to another but by solemn livery and seizin, matter of record, writing sufficient, made bona fide without covin or fraud ; yet, nevertheless, *divers and sundry imaginations, subtle inventions and practices*, have been used, whereby the hereditaments of this realm have been conveyed from one to another by . . . assurances craftily made to secret uses, intents, and trusts, and also, by wills and testaments, sometimes made by nude parol and words, sometime by signs, and token, and sometime by writing ; and for the most part made by such persons as be visited by sickness, . . . who, being provoked by greedy and covetous persons, lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritance, by reason whereof ” (after reciting many grievances) “other inconveniences have happened and daily do increase among the King’s subjects to their great trouble and inquietness ” . . .

To remedy this state of affairs the statute of Uses and Wills, known as the 27 Henry VIII., chap. 10, was passed, and thus, as Blackstone expresses it, “the statute conveyed the possession to the use and transferred the use into the possession, thereby making the *cestui-que* use complete owner of the lands and tenements, as well in law as equity ;” or, as Reeves states it, “By a kind of legal magic, the whole framework of landed property seemed on a sudden to be changed, and every man who before had only the use of his estate at the mercy of his feoffee, was made in an instant the complete and lawful owner of it.”

It would seem that the evils being cured, the common law could rest in peace ; but (I follow Blackstone’s words) “the various necessities of mankind induced the judges very soon to depart from the rigor and simplicity of the rules of the

“common law and to allow a more minute and complex construction upon conveyances to uses than upon others, and, although the Statute of Uses, having in view the protection of the people, conveyed the possession to the use and the use to the possession, a shifting use was invented by which it was held that a use, though executed, might change from one to another by *circumstances ex post facto*.”

By this neat shunpike the statute was evaded, and the chancery and common law judges, between them, so badgered and worried the poor common law, that even the uncertain length of the chancellor's foot was a *datum plane* compared with the modifications in store for its future; so that we find Lord Bacon, in 1615, speaking of the Statute of Uses as “a law whereupon the inheritances of this realm are tossed, at this day, like a ship upon the sea, in such sort that it is hard to say which bark will sink and which will get to the haven.”

The “divers and sundry imaginations, suitable inventions and practices” which stood out so prominently as grievances, in the preamble of 1536, a century later were in equal force, although called by a new name, and sponsored by judicial opinions.

We have eminent authority for the statement that the adoption of uses into the English law was “the fruit, first of fraud and afterwards of fear.” The Statute of Uses was in no sense an exception, unless it was all fraud, for certainly the six year parliament of Henry the Eighth inspired no fear in the mind of its gracious sovereign, which should cause him to hesitate, to ask for a statute, in spite of its lying preamble, passed to save the royal wardships by joining possession to use.

Perhaps Henry did not see the preamble, however, for in the year 1536, having found, in Queen Catharine's case, how complicated divorce proceedings were for a monarch of so marked a religious character, that Pope and Cardinals not only concerned themselves as to his spiritual and temporal welfare, but also as to his domestic affairs, he avoided any similar delays by

beheading Anne Boleyn as a summary way of providing the necessary bereavement, which in making him a widower gave him a chance for another wife.

Being thus occupied, he may not have found leisure to read the preamble of 1536, but he doubtless did that of 1541, which preceded the Statute of Wills, for that was an off year in which there was neither divorce nor assassination.

The solicitude expressed by the Statute of Uses in 1536 for testators "visited by sickness and provoked by greedy and "covetous persons lying in wait about them," was manifested in 1541, in the Statute of Wills, but it took quite a different shape, giving as a reason for the statute, that "persons of landed "estates could not conveniently maintain hospitality, nor provide "for their families, *the education of their families*, or the payment of their debts out of their goods and moveables" (mark the solicitude for general education), and preceded a statute enacting that lands, manors, tenements, and hereditaments could be disposed of as well by will as by an act executed in the testator's lifetime, but nevertheless providing that the king should obtain a full third right of wardships and prima-seizin.

The preamble, moreover, thanked the king for his grace and goodness toward his subjects, in granting them everything which he in his benevolence could confer, while the statute made certain the *quid pro quo*.

Whatever benefit or advantage was conferred upon the people as against the king, by the Statute of Uses and Wills, was, by the combination of the Statute of Wills and Shifting Uses, rendered utterly valueless, and Henry, having settled financial affairs to his satisfaction, again turned his attention to matrimonial concerns, and beheaded Catharine Howard in 1542.

But, after all, we can well afford to leave this old scoundrel of a king with his piety (for Catholic and Protestant alike made him Defender of the Faith), his wives, and his greed for wealth and power.

Even his legislation, though interwoven with the very fibre of the English law, is out of place in these days of codification, union of equity and law, and simplicity in criminal pleadings; days of such marked change that ere long we may seek, as of a by-gone time, for relics of that common law of which Blackstone wrote, and on which Mansfield rested his fame.

Out of the evils of Henry's reign good has probably grown in the establishment and regulation of trusts and trust estates; but with that outcome of uses I will not detain you, my purpose being to call your attention to certain instances in which as it seems to me, "the possession having been conveyed to the use, and the use transferred into the possession," circumstances *ex post facto* have so shifted the use that "it is hard to say which bark will sink, and which will get to the haven," as we look at them from the nineteenth century stand-point.

The instances of shifting uses which I ask you to consider with me, and to which I shall refer in this essay, are found:

1. In the jury system.
2. In the tenure of judicial office.
3. In the bread-getting of the profession.

It is no part of my plan to investigate, in the least degree, the history of trial by jury—neither its origin, its antiquity, nor the veneration felt for it by common law writers are pertinent to my view of the system as a "shifting use." I will therefore leave the origin with Alfred unhesitatingly. It is sufficient for us that the system exists, that it is likely to exist, and that by constitutional provisions of the General Government and State Governments alike, it is, so far as questions of fact are concerned, an integral part of our public polity.

When the possession was transferred to the use, and the use to the possession, the trial by jury meant, as defined by Blackstone, a determination by "the unanimous suffrage of twelve of

“one’s equals and neighbors, indifferently chosen, and superior “to all suspicion,” and it was such a system that Lord Commissioner Maynard enthusiastically denominated “the subject’s “birthright and inheritance, as his lands are, and without which “he is not sure to keep them or anything else . . . his fence “and protection against all frauds and surprises, and against “all storms of power.” It seems to me that this executed use has so far shifted, that we rarely find a panel of “twelve of one’s equals superior to all suspicion.”

In Blackstone’s time the panel was returned to Court upon the original *venire*, upon which the jurors were to be summoned and brought in many weeks afterward to the trial, in order that the parties might have notice of the sufficiency, insufficiency, character, and relations of those summoned.

In our own time we know so little of our jurors that we designate them by numbers—*exempli gratia*: the fourth juror in the first row, the third juror in the second row, the second juror from the foreman, much as we studied arithmetic, at our first venture, when we counted apples on trees, and apples on the ground, by aid of illustrative pictures. The juryman’s *relations* may be our adversary’s father and mother, for aught we know, and the determination of his sufficiency or insufficiency a complete illustration of “walking by faith, and not by sight;” indeed sometimes we find, after verdict, that the illustration goes even farther, and learn to our cost “that faith, without works, is dead.” An omnibus load of ordinary passengers, in our large cities, if landed in the jury box, furnishes as safe a panel as the twelve provided by the constituted authorities; in average cases, full as likely to do justice, and as little likely to err.

It would be useless to recapitulate instances of my own experience with juries, how an outside issue, or an insignificant circumstance, or an apparently unimportant phase of the controversy has entered into a juryman’s deliberations as a controlling

element—useless, for the simple reason that each one of us can draw illustrations from his own practice.

“Let me get one idea into that fellow with a yellow waist-coat,” said Sir James Scarlett, “and the case is safe, for it will take the idea longer to be dislodged than it did to plant it.” He believed in unanimity, you notice.

We have all met the smart juryman, the stupid juryman, the funny juryman, the obstinate juryman, the juryman who sleeps through the trial, and the one who sleeps through the argument, the juryman who takes notes, the juryman who asks questions, and, *horresco referens*, the juryman who knows the law. We leave them on or off, consulting not infrequently prejudice and interest, and then devote ourselves to the study of human nature among our client’s hypothetical peers, that we in our turn may be smart, funny, and sometimes perhaps stupid, as the exigencies of the occasion demand. I very much fear that Mr. Blackstone’s old fashioned idea of summoning twelve of one’s neighbors would simply provoke a challenge for favor when carried into practice.

Regarding this shifting use as an unwise departure, I propose certain lines of thought for the Association as suggesting possible remedies, commending them to your future deliberation. Representing the American bar, there is an influence here which can be felt throughout the land if once exerted, and to that influence I appeal for such action as may be to a degree, if not absolutely, in unison through legislation or otherwise, in the several States.

The remedies I suggest are :

1. A more careful scrutiny of the jury-box, and a higher standard for service as jurymen.
2. Compulsory service, as far as practicable, in fact as well as in theory.
3. Exemption from liability to duty, after service, until a specified time has elapsed.

4. Increase in the number of peremptory challenges, and, above all, fearlessness in the exercise of the right to use them.

5. A decent remuneration for jurymen when drawn upon the panel.

It requires no argument to show the advantage of character in the jury, and such safeguards as will best preserve and retain it; it is to me equally clear that the necessity of a higher standard in the service is shown by every day experience.

Our system stands self-confessed as inefficient whenever an important case goes to a struck jury, for the reason that the distrust of the ordinary panel proves the necessity of a more discriminate selection of triers. It would be a desirable result if every jury rose to the level of struck juries, as from time to time empanelled, and there is no reason why such should not be the case. How this end is to be attained is a matter worthy of our best deliberation—whether the jury-service should be based on property qualification, standing in the community, or known capacity for judgment. One thing seems to me beyond contravention: that it should be absolutely free from opportunity of approach, temptation, or influence; and I know of no safer guaranty of purity than a character which has so earned respect in the daily walks of life as to be deemed worthy of trust among “neighbors and equals,” and “superior to all suspicion.”

Let such care and precaution be exercised in the creation of the panel that the twelve arbitrators in the jury-box may at least approximate the standard of arbitrators chosen by parties; and however selected, let us at least devise some better method than to empty a directory into a wheel and abide the result of a lottery.

We estimate the value of lands taken in the exercise of eminent domain by arbitrators selected with care; we pass upon the powers acquired to exercise that right by arbitrators chosen at hap-hazard.

If law be "the perfection of human reason," would it not be well to preserve a logical connection between premises and conclusion, when we apply its principles in practice.

The interests of lawyers and clients are one in this matter, and the longer there is delay the greater the danger, lest the evil assume such proportions as to be outside our control; an evil, in my judgment, now within reach of the profession, single-handed, to remedy; and of so grave a character that we owe it to ourselves and to the honor of the bar, that the jury system should be lifted above the possibility of party politics, whither, in certain cases, there seems likelihood of its drifting; and to demand, as long as it is an element in the administration of justice, intelligence, honesty, and character among jurymen, as well as absolute protection in the discharge of jury duty throughout the length and breadth of the land.

It is possible that I misjudge jurors in other States than those in which I have had experience, but I think I will take the risk. Perhaps I should make an exception as to New Haven county, Connecticut, for during a discussion upon a subject germane to the one now under consideration, before our State Bar Association, one of that county's lawyers claimed that New Haven juries were, for the most part, composed of God-fearing men. I recall a similar instance in the case against Mr. Lustings, cited by John Bunyan in his *Holy War*, where among the jurors we find the names of Mr. Love-God, Mr. Heavenly-mind, and Mr. Zeal-for-God, but as these are the only two instances within my knowledge of panels eminent for piety, what I have said may stand without qualification.

If successful in establishing a higher standard for jury duty, it may be well to consider whether a majority verdict may not be expedient, or whether a verdict to be accepted should necessarily be unanimous. Our Grand Juries have long been conducted on the basis of a majority, practically, though twelve must agree; and on the trial of peers in the Court of Parliament, or Court of the High Steward, the judgment was deter-

mined in the same manner, "*per legale judicium parium morum*." I am yet somewhat of a doubter as to encroachments on unanimity, but we have only to take up a volume of Otto to satisfy ourselves that a majority can safely decide grave issues.

Permit another suggestion. In Lewis Carroll's story of "Alice in Wonderland," the Knave of Hearts was tried for stealing the tarts made by the Queen. The jury were furnished with slates and pencils, and although Alice could not see any word written upon the slates but "stupid," yet at every fresh bit of testimony the pencils were called into use.

We all rely upon our notes. The charge of the jury is based upon the judge's minutes; a review of a verdict is made deliberately upon a full examination of the evidence in detail, and neither counsel, judge, nor appellate court would risk the performance of their duty without such aids.

But we neither furnish the testimony to the jury, nor expect them to take minutes, and look askance at them if they do. We ask them, at the end of a protracted trial, to recollect all that is said, or else take for granted the accuracy of our summing up, shown by our adversary to be as unreliable as a broken reed.

The character of Alice's jury might have been improved, but assuming such a change, the slate and pencil is perhaps not a bad idea. Restrictions of such a nature, which we impose upon juries in the attempt to keep them impartial, are possibly better omitted entirely.

*Second.*—It is within the experience of us all that those best qualified for jury duty are the first to shirk it.

It is very inconvenient to lose time; it is annoying to be compelled to attend court when business or inclination are in opposition; and so an earnest excuse, or the payment of a penalty, or a bit of favoritism, absents many who should, of all others, be present.

Your well-to-do citizen, who regulates, with precise judgment, the affairs of corporations, and superintends millions of

capital in the busy work of labor, as a general his army, savagely berates the jury which fastens a round sum in damages upon him, out of sympathy for Jane Doe, Administratrix; your restless speculator, whose influence is felt from Wall street to Washington, swears in a louder tone than any call for stocks, if a stupid jury holds him to a contract he never made; neither of these gentlemen, however, deems a jury summons of the least consequence; they send word to their attorney, whisper to a judge, or draw a check for a fine.

The eminent jurist who presided in *Bardell vs. Pickwick*, as reported by Dickens,\* known to us as "the little judge," would not excuse the chemist whose assistant knew not the difference between oxalic acid and Epsom salts, notwithstanding the gloomy prospect of untimely deaths in consequence. Although the application of the rule was somewhat severe, yet the ruling itself furnishes an excellent precedent.

Until the courts hold all jurymen to their work, and insist upon the attendance of the eminently respectable alike with their more humble yoke-fellows, as a positive obligation due to the State, no more to be disregarded than a *capias* to testify, or compulsory attendance upon military duty, we cannot expect to restore this use to the possession and neutralize the evil effect of *ex post facto* circumstances.

*Third.*—There is a class of jurymen infesting smaller communities, known by the regularity of its attendance. Such a jurymen is always experienced, always acquainted with counsel, generally with the witnesses, and on friendly terms with the court. He brings up, from the storehouse of his memory, many notable trials, and compares them with the one in hand; he contrasts counsel with others, perhaps more eminent, and analyzes your argument by the test of his experience; he never disagrees with the court, but as *amicus Curiae*, in the jury room, is oracular as to the charge, suggesting, parenthetically, how

---

\* *Pickwick Papers*, cap. xxxiv.

the chief justice put the point at such and such a time. He is like an intermittent spring, now clear and sparkling upon the surface and now utterly lost to sight, reappearing when least looked for, following the trial as it may best suit himself without the least reference to or concern for others or others' ideas. He is apt to be the twelfth jurymen when the eleven disagree with him, and is then tenacious as to his own views, and, if convinced against his will, seldom yields till there is danger of an all night session.

Exemption from service during stated periods banishes this jurymen from court.

Until recently the United States statutes required jury service at but one term in a period of two years, and made attendance more frequently a ground of challenge—a statute which it would have been wise to retain; repealed, as I understand, by the new judicial expense bill; why, it is difficult to conceive.

From the professional stand-point its bearing on national questions is not very apparent, and if any statute was to be offered up to appease the wrath of statesmen, it seems to me that section 5239, which, solemnly re-enacted in the revision of 1873, provides that “the benefit of clergy shall not be used or allowed upon conviction of any crime for which the punishment is death,” might have been spared without serious detriment.

It certainly could not have been retained to hang a “literary feller” and exempt him from imprisonment for a term of years; or because, by ancient law, the benefit of clergy was given to those “having place and voice in parliament, even though they could not read, for the crime of horse stealing;” I am inclined to the opinion that it was re-enacted for the reason that “the benefit of clergy” had its origin “from the pious regard paid by Christian princes to the church in its infant state,” a sort of statute to pious uses, on behalf of national legislation, which

would lead us to expect better things of them than withholding appropriations from district attorneys.\*

I, however, suggest for our state practice statutes limiting service, as calculated to benefit both litigants and jurymen, by modifying this characteristic of permanence in the panel; litigants, by securing less prejudiced triers; jurymen, by relieving them to some extent of an onerous duty.

*Fourth.*—Two peremptory challenges, I believe the usual number in most States, avail but little. One frequently sees a jurymen much less objectionable than others, yet undesirable, after his challenges are exhausted, concerning whom he can only say:

“I do not like you Doctor Fell,  
The reason why I cannot tell;  
But this one thing I know full well,  
I do not like you Doctor Fell.”

Challenge, at option, of course within proper limits, is in my judgment, an inseparable incident in securing a trial by one's peers.

By the United States statutes, in capital cases, or when imprisonment is for life, the defendant has ten challenges, the government five; in felonies the government three, the defendant five; in misdemeanors and civil cases each party three. Such discriminations do harm. The true course is not only to establish the number of peremptory challenges in all cases, but to make it uniform. The right of challenge, however, avails little if the profession hesitates to use it. In some of the counties of my state, we tell the clerk quietly what jurymen to excuse, a very cowardly way, I confess; in all states we hesitate to offend a jurymen who may serve in the next case. Nothing moves the average jurymen more to the depths of his nature than a challenge of this kind, and it is only from united action among us lawyers that the jury will learn that a peremptory challenge is a right of a party with which they have no concern whatever.

---

\* *Quorum.....pars fui.*

*Fifth.* The usual per diem of a juror, except in cities, leaves him out of pocket when his expenses are paid—in cities, he is out of pocket by the loss of his time. If he is other than scrupulously honest, he is simply led into temptation, by being summoned to Court. The late Judge Grover once said to me that a judge, in respect to his salary, should repeat Agar's prayer, "Give me neither poverty nor riches"—the rule is applicable to jurors; we do not need to make it an object for them to serve, but we can at least pay them fairly enough to allow them to choose their own hotel without haggling as to price—and relieve, in a measure, the burden of compulsory attendance upon other men's business.

It is not so very long ago that judges were mere creatures of the sovereign power and dependent upon its caprice.

The use to which I refer now, came into possession under George III., and in the first year of his reign, A. D. 1760.

We can afford to give the last king of America all praise for his message to parliament, informing them that "He looked upon the independence and uprightness of the judges as essential to the impartial administration of justice, as one of the best securities of the rights and liberties of his subjects, and as most conducive to the honor of the crown," and due credit to the parliament which enacted full salaries to judges during continuance of commissions and the holding of office during good behavior.

Had George continued as he began, there might have been no taxation without representation, and no United States of America.

We retain the admirable provisions of the English Act in our National Judicial System, but in many states the use has shifted, owing to *ex post facto* circumstances.

It is foreign to my purpose to speak of the *manner* of judicial appointments, a subject on which there is much difference of opinion; I may say, in passing, however, that an elective

judiciary finds strong argument in its behalf, when, independent of political affiliations, an upright judge is retained in office. The judicial district within whose limits we meet to-day, furnishes a bright example in thus honoring one of blameless life, whose spotless integrity and eminent ability are universally recognized, abroad as well as at home. I limit myself to judicial tenure and the expediency of its determination by a term of years.

We elect a judge say for a period of ten years—he goes on to the bench, if you please, for illustration's sake, at forty, his fiftieth year finds him on the eve of retirement from a position in which his entire method of thought has in a great degree changed, to again seek the uncertainties and encounter the perplexities of active professional life, to which he must, to a large extent, re-adapt his tastes, his habits, and his studies.

It is a long step from the balancing of questions with judicial analysis, to the forensic appeal which makes the advocate, or even to the nearer difference which characterizes the argument *in banc*, but the only alternatives for the judge are retirement or candidacy for re-election.

He meditates upon the problem, concludes he will remain in office, and informs a very few friends of his determination.

His election, however, depends upon that peculiar American institution known interchangeably as the caucus or the primary.

Tom Jones and Squire Western run the caucus; that is well known. If they bring up their forces and name a candidate, whether by the force of lungs *viva voce*, or by the show of hands in a count, any other candidate goes to the wall.

Now, if our judge is called upon to preside in the case of Jones *vs.* Bilfill, in which Squire Western is a stiff swearer, the week before the caucus, is it very strange if the caucus occasionally creeps into the judicial mind through the interstices of self-interest, however carefully guarded such crevices may be in

intention? We err often unwittingly, through the weakness of poor human nature, and our judge, though his joints be of tempered steel, at times unconsciously bends the knee that "thrift may follow fawning."

But if our judge's lot is in a less serene atmosphere, and the caucus is managed by Michael O'Shaughnessy and John McQuirk—worthy gentlemen, but phlebotomists in politics—do you wonder that a check goes to his friends after the nomination is made, solely for the good of the cause and for strictly legitimate expenses, of course; and our judge, secure of party support, abandons the idea of selecting offices, or a partner, and consults the county authorities as to a new carpet for his chambers.

In the degree that the bench is removed from the possibility of bias, it is necessarily the more impartial; in the degree that it is removed from the possibility of influence, it is necessarily the more independent; in the degree that it is removed from the possibility of suspicion, it is necessarily the more honest. On its impartiality, its independence, and its honesty, depend the integrity of the judge, the purity of the profession, and the safety of the commonwealth.

The bar and the bench, as they administer justice, with no diversity of interest, protect on either side the public prosperity. Like mountain ranges they stand on firm foundations, the one over against the other, enduring the same storms, sharing the same sunlight, watched by the same stars; between them lies the peaceful intervale where rivers flow, where meadows green in verdure charm summer beyond its time, and hamlets and villages rest secure; break down either barrier, and tempests sweep through the valley stern and pitiless.

We believe in "whatsoever things are pure, whatsoever things are honest, and whatsoever things are of good report." In their name I urge judicial tenure for good behavior as "one of the best securities of the rights and liberties of the people and as most conducive to the honor of the republic."

The third and last instance I shall refer to, in which the

possession has been conveyed to the use and the use transferred into the possession, and the nineteenth century had its effect thereon; relates to the manner in which lawyers charge for services rendered to clients, which I have elsewhere denominated bread-getting.

I am aware that I tread on dangerous ground, but I am none the less persuaded that a shifting use exists in our pecuniary relations to the public, which the profession may profitably consider.

It is not my purpose to underrate the value of legal talent, nor to question the worth of the learning and experience, wrought out from years of arduous labor and painstaking research, which necessarily goes before the capacity to earn fortunes by those who have won the silk gown of precedence.

Indeed, I am forcibly reminded at this point of a decision by the Connecticut Supreme Court of Errors. The questions under consideration arose on a *quantum meruit* count, in an action of assumpsit for professional services; in giving the opinion Judge Foster says: "In the first place, there is a diversity of gifts"—to this sentiment we can all say Amen.

And further, it seems to me, that Mr. Jagger's mode, as described in "Great Expectations," had a deal of sense in it: " 'Now, I have nothing to say to you,' said Mr. Jaggers, "throwing his finger at them, 'I want to know no more than I "know; as to the result, it is a toss-up; I told you from the " 'first it was a toss-up; have you paid Wemmick?' 'We made " 'the money up this morning, sir,' said one of the men, submissively. 'I don't ask you when you made it up, or where, " 'or whether you made it up at all. Has Wemmick got it?' " 'Yes, sir,' said both the men together.' 'Very well, then, " 'you may go; if you say a word to me I'll throw up the " 'case.' " How very convenient to have Wemmicks making sure of the fees on the threshold of our labors.

Therefore, Mr. President, I beg you to believe me sound on the main question.

In 1742 Lord Chancellor Hardwicke expressed himself as follows (*Thornhill vs. Evans*, 2 Atkins, 332): "Can it be thought  
 " that this court will suffer a gentleman of the bar to maintain  
 " an action for fees, which is *quiddam honorarium*?"

In 1841 (*Adams vs. Cagger*, 26 Wend., 452) Mr. Senator Verplanck, giving one of the opinions of the majority of the court, says: "In a land wedded to old usages, we know that  
 " habit or prejudice may still keep up a distinction in form that  
 " has long ago passed away in substance, and thus compel the  
 " counsellor and the licentiate physician to look only to their  
 " honorary fees, whilst the surgeon or solicitor may sue for his  
 " bill; but in our bank note world, on this side of the Atlantic,  
 " and in an age when the greatest poets or novelists are willing  
 " to confess that they toil 'for gain, not glory,' it is ridiculous  
 " to attempt to perpetuate a monstrous legal fiction, by which the  
 " hard working lawyers of our day, toiling till midnight in their  
 " offices, are to be regarded in the eye of the law in the light  
 " of the patrician jurisconsults of ancient Rome, when

——' dulce dici fuit et solemne reclusa,  
 Manu domo vigilare, clienti promeri jura;'

" and who, at daybreak, received the early visits of their humble  
 " and dependent clients, and pronounced with mysterious brevity  
 " the oracles of the law." If Mr. Peter Cagger, defendant, was not satisfied with this opinion, he was a very hard man to suit.

In view of these quite diverse precedents, the question I wish to bring before the bar is this: Ought not a limit to be placed upon speculative charges, and restrictions other than "silence" be thrown around the plan of "addition and division?"

Most lawyers' offices, outside of the very large cities, receive, on an average about once a month, a polite request from some collecting agency for an offensive and defensive alliance, based upon the idea that "if I tickle you, you will tickle me."

Any fee received is to be equitably divided; no charge is to be made unless successful results are obtained, and reliance for

remuneration in the long run is placed upon the eminent respectability and large influence of the clientage subscribing ; while, lest any but the elect may be brought in contact, it is essential that every member of the bar participating in these advantages should be recommended by a judge or by a bank.

This hook is too thinly baited to catch many fish, but the attempt at angling is the legitimate result, in my opinion, of the latter day tendency to make the profession a trade.

In this speculative age the temptation to bargain is not easily resisted by clients, and the attorney who can shrewdly dicker outstrips those lawyers who regard practice as on a higher plane than a mere selling race.

I understand a member of the bar, in a certain city (say Calcutta for locality's sake), is in the habit of sending his card to any person injured on railroads, or to their representatives in case of death, accompanied with a polite intimation that he will bring an action for damages on his own responsibility provided the amount recovered is equally shared. It is growing to be a not infrequent custom to apply a similar rule, though not the same manner of announcement, in all cases whether they sound in damages or not.

I need not refer to the evils which grow up with such a system ; they are self-evident. Speculation is not troubled with conscience, nor self-interest with afterthought, and when the end justifies the means, the means are apt to adapt themselves to the end.

Where efforts and service are faithfully bestowed, the laborer is worthy of his hire ; it is unjust to leave him without compensation should his efforts fail of success, and it is useless to establish bar rules and maintain bar associations, if they are to be mere theoretical abstractions, disregarded in practice.

Neither speculation nor self-interest furnish excuse for departure from the honor of the profession ; maintenance is not utterly beyond reproach, though some judges seem to regard it as proper for us to "first endure, then pity, then embrace," and

I know of no better rule than that given by Chief Justice Parker, in *Thornton vs. Percival*, 1 Pick., 417: "It sometimes may be useful and convenient, when one has a just demand, which he is not able from poverty to enforce, that a more fortunate friend should assist him and wait for his compensation until the suit is determined, and be paid out of the fruits of it;" but beyond this we cannot safely go.

If it be that sharpness and shrewdness in trade is essential to professional success, a different training is necessary than that which most of us have had, and the sooner we know it the better; the "*quiddam honorarium*" may be a relic of the past, but I submit to you whether the objects of this association are the better served by adhering to ancient traditions, or by encouraging traffic.

In the suggestions made, brethren of the bar, I have endeavored to call your attention to some of the needs of the profession, in the hope that at least they may so far commend themselves to your favor that each may ask himself the question: "What are you going to do about it?" I have perfect faith that the answers will be for our common good. I might have limited myself to less general topics, and individualized my subject, for we all have our specialties, even if we never have a chance to practice them. My unfinished treatise on my favorite theme rests secure, abiding "the more convenient season," which so seldom is found in the bustle of our active lives, destined, I fear, to no better fate than awaited Mr. Pembroke's sermons in Waverly—the permanent seclusion of the author's desk. But, had I read to you my graver thoughts, it would perhaps have been out of place, for when the "master bowmen" are so soon to enter the lists, it suffices me to "pierce an outer ring."

Evils grow about every system; barnacles fasten upon the proudest ship; the sharpest blade gathers rust; the surest rifle will sometimes foul; but the best evidence of care is in the curing, and if so be that the ship must be scraped, or the blade burnished, or the rifle cleansed, even if barnacles, rust, and foul-

ness yield only to heroic treatment, the more earnest the effort, the surer the result.

So with our profession. At times we find it needing care and thought, lest things extraneous gain a foothold; but it is always the better, if we honestly acknowledge our fault, and honestly correct it. I recognize no calling more noble, none more worthy, none where veneering is so seldom mistaken for solid wood, and none where the reward of ambition is more surely given to desert and merit.

The pawn reaches the king-row step by step, and by plodding effort gains royal power, but, when gained, it is only laid down with life.

" A lowly one I saw,  
 With aim fixt high;  
 Nè to the righte,  
 Nè to the lefte  
 Veering, he marchèd by his law;  
 The crested knighte passed by,  
 And haughty surplice-vest.  
 As onward toward his heste,  
 With patient step he prest,  
     Sooth faste, his eye—  
 Now, lo! the last door yieldeth,  
 His hand a sceptre wieldeth,  
 A crowne his forehead shieldeth.  
  
 So, mergeth the true hearted,  
     With aim fixt high,  
 From place obscure and lowly,  
     Veereth he naughte,  
     His worke be wroughte.  
 How many loyal paths be trod,  
 So many royal crowns hath God! "

Two hundred years have passed since Thomas Jackson wrote his "Game of Chess;" its lesson is immortal.

## PAPER

READ BY

HENRY HITCHCOCK.

---

### *The Inviolability of Telegrams.*

What limitations exist, if any, upon the power asserted by the courts to compel a telegraph company, by a subpoena *duces tecum*, in proceedings to which it is not a party, to search for and produce in evidence private telegraphic messages remaining in its possession, is a question which cannot be said to have been satisfactorily determined.

Pending its authoritative solution by the courts of last resort, or by appropriate legislation, it is the object of this paper to call attention to the present aspect of the controversy, the laws now in force which bear upon it, and some further considerations which appear to have been overlooked, or at least imperfectly presented.

Five American cases in all are reported\* in which the question of the compulsory production of telegrams in evidence has been to some extent judicially considered. In each one of these the court overruled the objections urged against the power invoked; but the questions actually decided in the several cases were by no means equally broad. In only one of them (*ex parte Brown*, decided April 28, 1879, by the St. Louis Court of Appeals) was fully argued and expressly asserted the power of the courts, by the writ of subpoena *duces tecum*, to compel the local manager of a telegraph company—against its protest, and

---

\* *Henisler vs. Freedman* (1851), 2 Pars. Sel. Cas. 274; *s. c.*, Allen's Tel. Cas. 1; *The State vs. Litchfield* (1870), 58 Me. 267; *s. c.*, Allen's Tel. Cas. 494; *National Bank vs. National Bank* (1874), 7 W. Va. 544; *United States vs. Babcock* (1876), 3 Dill. 567; *ex parte Brown* (1879), 8 Cent. L. J. 378.

notwithstanding a penal statute of Missouri forbidding telegraph employees to wilfully divulge the contents of any private dispatch, except to the person addressed—to search for and produce in court, in proceedings to which the company was not a party, all private telegrams remaining on its files which had passed between persons named in the subpoena during six months preceding, neither the relevancy nor the competency of which was first made to appear. The grounds of this decision will be presently stated. As it will doubtless come before the Supreme Court of Missouri for review, it cannot be regarded as final even in that State.

The other four cases cited were of narrower scope, the relevancy of the telegrams called for being shown, admitted, or assumed in the decision of each. In *United States vs. Babcock*,\* the only question decided on this head was, whether the subpoena there issued was sufficiently certain in describing the dispatches required. The remaining three turned chiefly upon the construction of local statutes, or the claim that telegrams, *as such*, constitute a new and distinct class of privileged communications.

Of English decisions, only four are pertinent. In *Waddell's Case*,† decided in Newfoundland in 1861, and *Ince's Case*,‡ in 1869, by the English Court of Common Pleas, both very briefly reported, the production of telegrams by private telegraph companies was enforced. On the other hand, in two English election cases,§ in 1874, the court refused to compel the production of private telegraphic dispatches by the government postal-telegraph officials, on the ground that the government, in assuming exclusive control of the telegraph service, had invited a confidence on the part of private persons sending messages which it was against public policy to violate.

---

\* 3 Dill. 567.

† 8 Jur. (N. S.) pt. 2, 181; s. c., Allen's Tel. Cas. 496, note.

‡ 20 L. T. (N. S.) 421; s. c., Allen's Tel. Cas. 497, note.

§ Stroud Case, 2 O'Malley & H. (Elect. Pet. Rep.) 72; Taunton Case, *Id.* 112.

A like power has been more than once exercised by legislative bodies in the United States ; as, by the House of Representatives of Mississippi during the impeachment of Governor Ames, at the session of 1876, and notably in the case of Barnes, by the House of Representatives at Washington, in January, 1877, shortly before the institution of the electoral commission.

As the report of the House Judiciary Committee,\* declaring Barnes guilty of contempt, and the opinion of a majority of the St. Louis Court of Appeals in *ex parte* Brown, furnish the best, if not the only statement of the grounds upon which the unqualified power in question has been maintained, a brief account of these cases, and of the arguments presented in opposition, will present the controversy as it now stands.

Barnes, the Western Union Telegraph manager at New Orleans, was brought to the bar of the House on January 5, 1877, for an alleged contempt, in that he had refused, when testifying as a witness before the Louisiana Affairs Special Committee, to produce certain telegrams described in a subpoena *duces tecum* served on him December 13, 1876, by direction of the chairman of the committee, as "all telegrams sent "or received by William Pitt Kellogg, S. B. Packard [and six "other persons named], at the office of the Western Union "Telegraph Company, New Orleans, from and after the 15th "day of August, 1876." He appeared also by counsel,† and answered in an elaborate protest and argument, which, besides objecting to the form of the subpoena, and its service upon a subordinate, instead of the governing officers of the company, denied "the right or power even of the judicial tribunals of the "country to compel the production of private telegraphic messages under the writ of subpoena," upon grounds which were in substance, the following :

---

\* See full report of proceedings in Vol. V., pt. 1, Cong. Rec. (44th Cong., 2d sess.), pp. 452-455, 602-608, 678, 694.

† Grosvenor P. Lowrey, Esq., of New York.

1. That under the instructions of his superiors, he was not at liberty to search, or permit search, among the files in his custody for the "campaign messages" called for by the chairman of the committee, the subpoena not overruling his obligations as an employee.

2. That for the reasons of public policy stated by Judge Cooley (Const. Lim. 306, 307, note), no such demand could lawfully be enforced against him, or any agent of the company.

3. That a judicial or other subpoena, couched in such general and sweeping terms, would be in effect a *general warrant*, within the prohibition of the fourth amendment to the Constitution of the United States, and in violation of the great principles established in Wilkes's case, *Entick vs. Carrington*, and similar decisions (2 Wils. 151, 275).

4. That in obeying the subpoena he would subject himself to punishment under the penal statute of Louisiana, which forbids all telegraph employees to "reveal, make use of, or make public "any dispatch;" and that the House had no power to interpret, modify, abrogate, or protect the witness from such statute.

The whole matter was referred, without debate, to the House Judiciary Committee, who, one week later (January 12, 1877), through the Hon. Proctor Knott, chairman, made a report, reviewing the witness's answer at length, and declaring that in refusing to produce the telegrams in his possession, and so required of him, he was guilty of a contempt. The following, in substance, were the propositions relied on by the committee:

1. That telegraphic messages, *as such*, do not constitute a class of privileged communications, and that no special privilege was shown to attach to the telegrams in question; citing, in opposition to Judge Cooley, the cases of *Henisler vs. Freedman*,\* and *The State vs. Litchfield*.\*

2. That the witness could not excuse himself for not producing telegrams actually in his possession, by alleging contrary orders from a superior, or that he held them merely as an employe; citing *Amey vs. Long*, 9 East, 473.

3. That the English election cases† referred to were irrele-

---

\* Cited *supra*.

† Stroud Case and Taunton Case, cited *supra*.

vant, the court there refusing to violate the confidence invited by the government itself in establishing the postal telegraph—the circumstances being thus essentially different.

4. That the Louisiana statute furnished no excuse, since the production of telegrams by the witness in obedience to lawful authority would not be a wilful violation of such statute, nor punishable as such (citing *Lee vs. Birrell*, 3 Camp., 337, and *Waddell's Case*, 8 Jur. (N. S.) pt. 2, 181); and that the power of the House, under the Constitution, to institute investigations, and to compel testimony, and the production of any paper necessary to render the same effectual, was unquestioned, and any State statute in derogation thereof void.

5. That, without discussing at length the constitutional question presented by the witness, "it is, perhaps, sufficient to say "that in the hundreds of instances in which the subpoena *duces tecum* has been resorted to [in English and American courts "and legislatures], the similarity which the witness supposes to "exist between that writ and the 'general warrants' condemned "by the constitutional provision cited by him has never yet "been detected." This, it may be remarked, was the only argument or reply made by the committee on that somewhat important branch of the question.

6. That the opinion of Judge Dillon (Treat J., concurring) in the case of *The United States vs. Babcock* (3 Dill., 567) furnished a most complete answer to the witness's objections to the subpoena, "and the correct rule, and the one which has "been followed by the committee in this instance." In this part of their report, the committee must be understood as referring exclusively to the objections made by the witness as to the *form* of the subpoena, and the sufficiently certain description of the papers therein called for. Nothing else was considered or decided in that case.\*

---

\* The rule stated by Judge Dillon in the case cited was as follows: "The "papers [called for by the subpoena] are required to be stated or specified only "with that degree of certainty which is practicable, considering all the circumstances of the case, so that the witness may be able to know what is wanted "of him, and to have the papers on the trial, so that they can be used if the "court shall then determine that they are competent and relevant evidence." In the same opinion the court expressly stated that the materiality of the telegrams called for was *prima facie* established by the official averment of the

Upon the reception of this report, Mr. Knott offered a resolution adjudging the witness to be in contempt of the House, and ordering him into close custody till he should obey the subpoena; which was at once adopted, under the previous question, without debate,—*yeas, 131; nays, 72; not voting, 87.* Four days later (January 16, 1877) the witness signified to the House his willingness to produce the telegrams;\* and, on the recommendation of the Judiciary Committee, was permitted, still in custody, to go to New Orleans for them.†

It will hardly be claimed, under the circumstances, that this action of the Judiciary Committee, and of a minority of the House of Representatives, can be accepted as a judicial authority. It was taken at a time of extraordinary excitement, in connection with political controversies of the gravest character, by a parliamentary and not a judicial body, all parties composing which were deeply interested in the possible results of the disclosures sought. If the doctrine maintained by the House Judiciary Committee is to be upheld by the courts, then, not only each House of Congress, but equally each House of every State legislature is armed with the power, at will, through a committee or otherwise, to compel the production and inspection, at any time, of every private message remaining on file in any and every telegraph office within their respective States,—not as being competent or relevant to any inquiry before it, but for the mere purpose of finding out what evidence, pertinent or not pertinent to such inquiry, the messages there accumulated may disclose.

It is the proper function of the courts to determine the ex-

---

district attorney; and further observed: "No objection is made on the ground " that these messages are privileged confidential communications; \* \* \* " therefore we need not consider whether there is any ground to suppose that, " in law, the Telegraph Company occupies a different position than would be " occupied by private persons having custody of the same papers." 3 Dill., 570.

\* Vol. V., pt. I, Cong. Rec., 678.

† *Id.*, 694.

istence and the limits of any such power, whether asserted by a legislative body or by a judicial tribunal.\*

Ex parte Brown was a case arising on a writ of *habeas corpus* sued out of the St. Louis Court of Appeals, in April, 1879. Brown, the petitioner, who was the general manager of the Western Union Telegraph Company at St. Louis, in charge of its local office and files, was served with a subpoena *duces tecum*, issued by the St. Louis Criminal Court, at the instance of the grand jury, then in session, by which he was commanded to appear and testify before the grand jury in a matter pending before them, and also there to produce—

\* \* \* “any and all telegraphic messages, or copies of  
“the same, now in the office of the Western Union Telegraph  
“Company, of which you are manager, and which dispatches  
“and messages are now in your possession and under your con-  
“trol [here various persons were named as persons between  
“whom dispatches passed], and any and all telegrams, or the  
“copies and originals, that may be in your possession, which  
“may have been sent or received by and between any or all of  
“the above-named parties within the last six months.”

The witness appeared and answered certain questions relating to supposed offences, by persons other than himself, within the jurisdiction. But he refused, after admonition in open court, to produce, or search, or permit search for, telegrams such as called for, alleging in excuse the contrary instructions of the company, and the penal statute of Missouri prohibiting the disclosure, by any telegraph employe, of the contents of any private dispatch to any person other than the one addressed, or to his agent, etc. Being thereupon committed for contempt of court, he raised the question of the power of the court to compel obedience to such a subpoena under such circumstances, by suing out the writ in question.

The case for the petitioner was very fully and ably presented

---

\* Burnham vs. Morrissey, 14 Gray, 239.

by the local counsel for the telegraph company,\* on grounds very similar to those taken in the Barnes case. It was contended, in substance :—

1. That the witness, being simply a servant intrusted with the mere custody of telegrams sent and received, they were not in his, but in the company's, possession; and that he could not be lawfully required to disobey the strict prohibitions of his superiors against disclosing their contents.

2. That the subpoena on its face did not assert the existence of any such message as therein called for; that the process was inquisitorial, and not judicial, and was in the nature of a search warrant, to ascertain whether, during the past six months, any such papers had existed, and were still in existence.

3. That obedience to the writ would involve the violation by the petitioner of a statute of Missouri making the disclosure, by any telegraph employe, of the contents of a telegram, a penal offence.

4. That the compulsory production and disclosure of telegrams is against public policy; that the telegrams, which of necessity are intrusted to and remain with the telegraph company, are, nevertheless, private papers, and the property of those who send and receive them; and that to compel their production by such a subpoena is in violation of the fourth amendment to the Federal Constitution, and the identical eleventh section of the Missouri Bill of Rights, which alike prohibit "unreasonable searches" and seizures."

5. That the telegraph service of the country, especially since the passage of the Act of Congress of July 24, 1866, concerning telegraph lines (U. S. Rev. Stat., title 65, sect. 5,263, *et seq.*), and the decision of the Supreme Court in the Pensacola telegraph case (96 U. S. 1), occupies a like footing with the postal service as an indispensable means of commercial intercourse; and that every consideration of public policy and of constitutional and primordial right applicable to interference with letters in the mails, applies equally, under like limitations, to the

---

\* Edmund T. Allen, Esq., with whom was Mr. J. G. Lodge, and to whose courtesy the writer is greatly indebted for a perusal of the learned and elaborate argument submitted.

compulsory production of telegrams by the companies or their agents, in matters to which they are not parties; the latter, equally with the former, being in effect an invasion of the "primordial right of free communion" which every free people must jealously guard, and an "unreasonable search or seizure" within the constitutional prohibition.

The views of Judge Cooley on this question were also cited as of great persuasive authority.

The opinion of the court, remanding the petitioner, was delivered by Hayden, J. (Bakewell, J., concurring; Lewis, P. J., dissenting, but filing no opinion), and is reported in the Central Law Journal for May 9, 1879, (vol. 8, No. 19, p. 378).

The grounds of the decision \* were, in substance, as follows:—

1. The constitutional provision against unreasonable searches and seizures has little bearing on this case. The evil and illegality which that was intended to prevent was the indiscriminate seizure of all papers which the accused preserved in the privacy of his home, and compelling by force the communication of their contents, thereby constraining the person, so far as the papers availed against him, to become his own accuser. But it expressly provides that even the sanctity of home shall not remain inviolable against the hand of criminal justice.

2. The case is wholly different when, by his own communication to others, a man's thoughts pass into the region of action. No voluntary communication is privileged from compulsory disclosure, if it be not within the classes of privileged communications excepted on grounds of public policy,—as in the case of attorney and client, or husband and wife. All the adjudged cases hold that there is no peculiarity in telegraphic communications, as such, which exempts them or their contents from the process of the courts (citing *Henisler vs. Freedman*, *The State vs. Litchfield*, *National Bank vs. National Bank*, and the other cases cited *supra*). In the case of *United States vs. Babcock*, 3 Dill. 567 (say the court), the question above discussed was not raised.

3. Communications by telegraph are voluntarily made by the sender to the telegraph employee, and are no more entitled to

---

\* Condensed by the writer, but, so far as practicable, in the language of the court.

protection or privilege than any other unwilling disclosure of business secrets. It is different with sealed letters and packages by mail, which, in the fact of sealing, retain the purpose and recognized type of secrecy, and the character of private papers. The analogy alleged between the telegraph and the mail, therefore, does not exist. Nor do the reasons for the statutory protection of letters, while in the mail, apply to dispatches retained in the telegraph office. The transmission of sealed letters, unbroken, is a trust which the government undertakes, and virtually compels their writers to commit to it, and which established custom and good faith oblige it to perform, without violating or permitting others to violate it. The post-office is a department of the government with whose operations the States cannot interfere; but even letters are privileged only while in the mail. As to telegrams, no such trust or custom exists. Senders, receivers, and telegraph company know that, upon due process, the messages which the company takes the risk, and the consequences of keeping, must be produced, for such is the law.

4. The production of telegrams, as of other private writings, must be regulated by fixed and uniform rules. Evidence of this kind should be uniformly admitted, when competent, or uniformly excluded. If courts are to be shut out from the sources of truth afforded by new methods of communication, they will so far fail in the chief purpose of their establishment. In civil cases, where the operation of the writ would be harsh, the power will be exercised, undoubtedly, in the sound discretion of the court. Inconveniences consequent upon the execution of the laws must be endured.

5. To the objection that the subpoena calls for any and all messages which may have passed between the parties named, during the past six months, without reference to facts or subject-matter, and that the papers required are not, therefore, sufficiently or certainly described, a sufficient answer is found in the obligation of secrecy imposed by law upon the grand jury.

6. This is not the case of a mere clerk or subordinate summoned to produce papers not under his control. The corporation may be reached through any agent having, like this witness, the actual control and means of responding to the writ; and contrary instructions do not excuse him.

7. The penal statute of Missouri referred to does not protect telegrams against a subpoena, for it expressly excepts disclosures

made to a court of justice. Even if it did not, there is implied in every such statute an exception in favor of legal process (citing *Lee vs. Birrell*, 3 Camp., 337).

An altogether opposite view to this, as the profession are well aware, has been maintained by Judge Cooley; originally in a note at page 306 of his valuable treatise on Constitutional Limitations, and recently, at more length, in a very earnest article on this subject in the *American Law Register* for February, 1879. The unqualified ground taken by this eminent jurist will appear from the following extract from the note referred to:—

After saying that “the importance of public confidence in the inviolability of correspondence through the post office cannot well be overrated,” he proceeds:

“The same may be said of private correspondence by telegraph. *The public are not entitled to it for any purpose*; and a man’s servant might, with the same propriety, be subpoenaed to bring into court his private letters and journals, as a telegraph operator to bring in private correspondence which passes through his hands. In either case it would be equivalent to an unlawful and unjustifiable seizure of private papers—such an unreasonable seizure as is directly condemned by the Constitution.”

The article in the *American Law Register*, above referred to, maintains the same conclusion with equal emphasis. The argument is based upon considerations of public policy evidenced by, and public faith pledged in, the statutory prohibitions against disclosures by telegraph employees; upon the supposed analogy between correspondence by telegraph and by mail; upon the constitutional guarantee against unreasonable searches and seizures; and the widespread disturbance, scandals, and mischiefs likely to result from enforcing the opposite doctrine. The article concludes with the following summary of objections to what it describes as “the doctrine that telegraph authorities may be required to produce private messages on the application of third persons,” namely:

“1. That it defeats the policy of the law, which invites  
“free communication; and, to the extent that it may discourage  
“correspondence, it operates as a restraint upon industry and  
“enterprise; and, what is of equal importance, upon intimate  
“social and family correspondence.

“2. It violates the confidence which the law undertakes to  
“render secure, and makes the promise of the law a deception.

“3. It seeks to reach a species of evidence which, from the  
“very course of business, parties are interested to render blind  
“and misleading, and which, therefore, must often present us  
“with error under the guise of truth, under circumstances  
“which preclude a discovery of the deception.

“4. It renders one of the most important conveniences of  
“modern life susceptible, at any moment, of being used as an  
“instrument of infinite mischiefs in the community.”

It would seem that the learned writer still maintains the inviolability, under any circumstances, of any telegram remaining in the possession of a telegraph company, against a subpoena or other process for its compulsory production in proceedings against or between third parties.

The foregoing is believed to be a fair and accurate summary of the arguments hitherto presented on both sides of this interesting and important question.

It is not surprising that its just solution should be reached only by gradual steps. In the sphere of political and legal science, as in that of physical research, the application to a new state of facts, even of ascertained truths or established laws, is constantly embarrassed by conflicts and exceptions growing out of other truths and laws also having relations with such facts, and which equally refuse to be ignored. The telegraph, as a new means of communication, has its peculiar methods and features, as well as an exceptional growth; and, in solving questions which relate specially to that system, these must be borne in mind.

In the year 1878, according to the American Almanac for

1879, there were in operation in the United States and Territories 97,628 miles of telegraph lines, served at 9,726 offices; and during that year the two principal telegraph companies transmitted very nearly twenty-eight millions (28,000,000) of messages.

But statistics do not adequately express the true functions of those slender wires, which run along every artery of commerce, and search out every remote extremity of the body politic, radiating from the centres of wealth and busy production like the marvellous net work of the human nerves from their ganglia, and, like them, hurrying to and from the outposts of life the ceaseless current of intelligence received and commands to be obeyed. They are the medium by which, with the speed of thought, are transmitted the desires, the purposes, the transactions of every class, the events of every hour, not only from ocean to ocean, but to the ends of the earth.

Such an agency demands, and it has received, recognition from courts and legislatures as a new factor in civilization. Said the Supreme Court of the United States, speaking by Chief Justice Waite (*Pensacola Tel. Co. vs. Western Union Tel. Co.*, 96 U. S., 9):

“The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of intercommunication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than eighty per cent. of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders; contracts are made by telegraphic correspondence; cargoes secured, and the movements of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information. It is not only important to the people, but to the government. By means of it the heads of departments in Washington are kept in close communication with all their various agencies at

“home and abroad, and can know at almost any hour, by inquiry, what is transpiring any where, that affects the interests they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and inter-communication comes within the controlling power of Congress, certainly as against hostile State legislation.”

The learned chief justice might have added—had it been pertinent to the question in hand—that the five or six millions per annum of telegrams which did not relate to commerce, included certainly the most urgent, and perhaps the most important, part of the private correspondence of the whole country during that period; that of these a large part were of the most confidential character, often veiled in cipher, purposely made difficult (though not always impossible) even for experts to unravel; that in many States the unauthorized disclosure, by a telegraph employee, of the contents of a telegram, is a penal offence, and that in probably every State this protection is by the public believed to exist, and is generally relied on.

Let us now briefly consider the legislation, federal and State, which this new agency has called forth.

By the Act of July 24, 1866 (re-enacted as tit. 65, secs. 5263–5269, Rev. Stat.), Congress granted to every telegraph company then or thereafter to be organized under the laws of any State, the right—not transferable, and conditioned upon its acceptance of all the conditions of the Act—to construct and operate lines of telegraph through and over any portion of the public domain; over and along any of the military or post-roads of the United States; also over, under, or across the navigable waters of the United States; together with the further right to take material for construction from any public lands, and to preëempt and use as stations, not less than fifteen miles apart, nor to exceed forty acres for each, portions of unoccupied public lands. The acceptance of the Act is to be filed in the postmaster general's office; and the only further conditions are, that government dispatches (including those of the signal service) shall have priority over all others, and shall be sent at

rates to be annually fixed by the postmaster general; and further, that the United States, at any time after July 24, 1871, shall have the right to purchase all the telegraph lines, property, and effects of any or all of said telegraph companies, at an appraised value, to be fixed by arbitration, as therein provided.\*

This is the only legislation by Congress, hitherto, relating to telegraph companies, their rights, or obligations.

In the Pensacola Telegraph Case, already cited,† the Supreme Court, construing this Act in connection with the Act of 1872 (U. S. Rev. Stat., sec. 3,964), which established as *post-roads* “all railroads, or parts of railroads, which are now or may hereafter be in operation,” held that the Act of 1866 applied to all railroads whatever in the United States; that it was constitutional, and within the grant of power to Congress “to regu-

---

\* The following has recently been published as an authentic list of the telegraph companies which have filed their acceptance of the Act referred to and are officially recognized by the post office department as within its provisions: The American Submarine Telegraph Company, of New York, N. Y.; International Telegraph Company of Portland, Me.; The Atlantic and Pacific Telegraph Company of New York, N. Y.; Mississippi Valley National Telegraph Company, of St. Louis, Mo.; Western Union Telegraph Company, of New York, N. Y.; Northwestern Telegraph Company, of Kenosha, Wis.; The Franklin Telegraph Company, of Boston, Mass.; The Insulated Lines Telegraph Company, of Boston, Mass.; Pacific and Atlantic Telegraph Company, of Pittsburgh, Pa.; The Atlantic and Pacific States Telegraph Company, of Sacramento, Cal.; the Eastern Telegraph Company, of Philadelphia, Pa.; The Delaware River Telegraph Company, Philadelphia, Pa.; Peninsula Telegraph Company, New York City; The American Cable Company, of New York, N. Y.; Southern and Atlantic Telegraph Company, of Philadelphia, Pa.; International Ocean Telegraph Company, New York City; Missouri River Telegraph Company, of Sioux City, Iowa; Atlantic and Pacific Telegraph Company, of Missouri; New Jersey and New England Telegraph Company; Central Union Telegraph Company, New Orleans; New York Land and Ocean Telegraph Company; Deseret Telegraph Company, Salt Lake City, Utah; American Union Telegraph Company, of New York; American Union Telegraph Company, of Missouri; American Union Telegraph Company, of New Jersey; American Union Telegraph Company, of Baltimore; Baltimore and Ohio Railroad Company; Toledo, Wabash, and Western Railroad Company.

† 96 U. S. 1.

“late commerce with foreign nations, and among the several “States,” and suspended all State statutes with which it was in conflict. The court further held that the constitutional powers so conferred upon Congress—

\* \* \* “are not confined to the instrumentalities of commerce or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse, with its rider, to the stage-coach; from the sailing vessel to the steamboat; from the coach and steamboat to the railroad; and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty of Congress to see to it that intercourse among the States, and the transmission of intelligence, are not obstructed or unnecessarily encumbered by State legislation.”\*

The telegraph system of this country has thus been recognized, both by the Congress and the courts of the United States, as an indispensable agency of commercial intercourse, and for the transmission of intelligence, subject to the control and regulation, and entitled to the protection, of the government. To this extent it is clear that an important analogy exists between the postal service and the telegraph service. Each system is within the grant of congressional powers; each is recognized, and to be protected against any interference or obstruction under color of State authority. And though, as yet, the government has not deemed it expedient to undertake the service of the telegraph, as governments elsewhere have done, it has nevertheless reserved that right, as a condition of valuable privileges offered to and accepted by the private companies which now conduct it.

---

\* 96 U. S. 9.

But here the analogy ceases. Congress has not in any manner prescribed regulations for the conduct of telegraphic intercourse, even to which the government is a party,—except as to its prior right of transmission, and provision against excessive charges,—nor for the protection or secrecy of telegrams, as such. These matters have hitherto been left wholly to the States.

On the other hand, it is commonly known that penal statutes of the United States protect the uninterrupted transmission of communications intrusted to the mail.\*

The opponents of the compulsory production of telegrams lay much stress upon the supposed analogy, as to their privileged character, between communications by mail and by telegraph. It is said that the reasons of public policy which protect the former apply equally to the latter. In the argument of *ex parte* Brown, counsel cited from the opinion of Field, J., in *ex parte* Jackson,† the following passage, whose importance justifies its repetition here :

“Letters and sealed packages of this kind in the mail are as  
“fully guarded from examination and inspection, except as to  
“their outward form and weight, as if they were retained by  
“the parties forwarding them in their own domiciles. The  
“constitutional guaranty of the right of the people to be secure  
“in their papers against unreasonable searches and seizures,  
“extends to their papers thus closed against inspection, wher-  
“ever they may be. Whilst in the mail they can only be opened

---

\* By section 3,891 of the Revised Statutes, it is made punishable by fine and imprisonment for any employee of the post office department to unlawfully detain, delay, or open, or to secrete, embezzle, or destroy any letter, packet, bag, or mail of letters intended for conveyance by mail and intrusted to him, or which has come into his possession, whether it contain any thing of value or not. By section 3,892, fine and imprisonment at hard labor are denounced against any person who shall take out of the mail, before its delivery to the person to whom it was directed, any letter, postal card, or packet, though not valuable, with a design to obstruct the correspondence, or to pry into the business or secrets of another, or who shall secrete, embezzle, or destroy the same.

† 96 U. S. 733.

“and examined under like warrant, issued upon similar oath or  
“affirmation, particularly describing the thing to be seized, as  
“is required when papers are subjected to search in one’s own  
“household. No law of Congress can place in the hands of  
“officials connected with the postal service any authority to in-  
“vade the secrecy of letters and such sealed packages in the  
“mail; and all regulations adopted as to mail-matter of this  
“kind must be in subordination to the great principle embodied  
“in the fourth amendment to the Constitution.”\*

Now, an argument for the protection of telegrams against compulsory disclosure, based upon a supposed analogy between the postal and the telegraphic service, may seek to build itself either upon the policy of the postal statutes, which protect letters while in transit through the mail, or upon the fourth constitutional amendment (and like provisions in the State constitutions), as expounded in *ex parte* Jackson, or upon both. But these two grounds are quite distinct. The opinion in *ex parte* Brown practically ignores the latter, or constitutional argument, while furnishing a reply to the former, which a brief

---

\* The fourth amendment is in the words following:—

“The right of the people to be secure in their persons, houses, papers, and  
“effects against unreasonable searches and seizures shall not be violated; and  
“no warrants shall issue but upon probable cause, supported by oath or affirm-  
“ation, and particularly describing the place to be searched, and the persons  
“or things to be seized.”

It is hardly necessary to remark, that although the provisions of this amendment to the Federal Constitution have been held by the Supreme Court (*Smith vs. Maryland*, 18 How., 76; *Barron vs. Mayor of Baltimore*, 7 Pet., 243) to apply only to warrants under the laws of the United States, and not to State process, yet similar provisions are found in all but one of the Constitutions of the several States. The single exception is the Constitution of the State of New York, which contains no such provision. It is found, however, in language identical with the fourth amendment, in the “Bill of Rights” enacted as a statute in New York in 1787, and ever since in force; and the statutory requirements in that State touching the issue and service of search warrants yield in strictness to none others. Rev. Stat. N. Y. (5th ed.) 1859, pp. 1040, 1041; tit. 7, art. 3, secs. 32–35. In *Bell vs. Clapp*, 10 Johns., 266, Kent, C. J., speaks of “the checks which the English law, and even which the Federal Constitution have imposed upon the operation of these search warrants, and with  
“the manifestation of a strong jealousy of the abuses incident to them.”

examination of those statutes will confirm. Only two sections are found in the United States postal laws relating to this subject.

Section 3891 of the Revised Statutes forbids post-office employees to “*unlawfully* detain, delay, or open any letter, packet, “ bag, or mail of letters intrusted to him, and which has come “ into his possession, and which was intended to be conveyed “ by mail, or carried or delivered by any mail carrier,” &c., &c. This does not establish the absolute inviolability even of letters in the mail, since it implies that there may be circumstances under which a post-office employee might lawfully do either, leaving those circumstances undetermined by the law-maker, and to be ascertained by the courts. No very satisfactory analogy could be based on this for the absolute inviolability of telegrams.

Section 3892 forbids any person whomsoever from taking out of the mail any letter, postal-card, or packet, before it has been delivered to the person to whom it was directed, with a design to obstruct the correspondence, or to pry into the business or secrets of another. In both sections it is also made punishable to “secrete, embezzle, or destroy” any letter, &c., during its transmission by mail; either of these acts being made conclusive, apparently, of the criminal intent.

It is perhaps the latter section upon which is based the argument as to the policy of the postal statutes, that they are designed to assure the inviolable secrecy, as well as the safe delivery, of letters sent by mail. No doubt, if these statutes are obeyed, letters will remain inviolate in the mails, as incidental to their safe transmission and delivery. But the offence which this section proscribes is not *the disclosure of the contents*, nor even primarily the opening or reading of private letters. It consists in *taking out of the mail, before its delivery to the person to whom directed, any letter, postal-card, or packet*, with a design either (1) to obstruct the correspondence, or (2) to pry into the business or secrets of another. Postal-cards carry no secrets,

and disclose their contents to the casual glance. Yet it is equally a crime designedly to obstruct the delivery of a public notice sent by postal-card, as that of the most important and confidential letter, by taking it out of the mail; while to disclose the contents of such a letter, however otherwise the knowledge of them was obtained, is not an offence within this Act, provided the letter itself, while in the custody of the government, was not delayed, opened, or taken out of the mail. Moreover, the protection of the Act ceases instantly with the delivery of the letter to the person addressed, after which no inspection or disclosure of its contents, however unauthorized or injurious, is a violation of this Act. It is evident, therefore, that the intent and policy of the postal statutes is to protect and assure, not so much the secrecy of private correspondence, as *the due fulfilment of a trust voluntarily undertaken by the government in respect of its safe and prompt delivery*. It has undertaken this mode of serving the public, and invites the public confidence in such service; therefore, it will punish any violation of the confidence so invited, any interference with its execution of that trust, not sanctioned by law.

But, in respect of telegrams transmitted by private companies, the United States have undertaken no trust or duty, nor invited any confidence whatever. The postal statutes, therefore, not only do not protect the secrecy of telegrams, directly or by intendment, but they are founded on reasons which, so far as the Government is concerned, furnish no argument, even by analogy, for their protection. Finally, it is difficult to see how any argument can be drawn from the postal statutes of the United States, either directly or by way of analogy, in respect of what is or is not *the existing law of any State*,\* to be administered by the courts thereof.

This view of the postal statutes of the United States is en-

---

\* That the legislature of any State, in determining what new laws the public welfare requires, may approve and adopt the policy of laws already enacted by other States or by the United States *in pari materia*, is obvious: but this is as obviously a different proposition.

tirely consistent with the doctrine of *ex parte* Jackson,\* that sealed letters and packages, *whilst in the mail*, are also protected from violation by the constitutional provision against “unreasonable searches and seizures,” though not protected even in the mail (as the court distinctly say) against search-warrants issued in pursuance of law. The test of the constitution is *the unreasonableness* of the search or seizure—a term purposely left undefined, as are the terms “cruel and unusual punishments” and “excessive bail,” in the eighth amendment, lest their efficiency should be impaired under circumstances not then foreseen.

Apply this test of *unreasonableness* to the invasion (without lawful warrant) of the secrecy of sealed letters while in the mail. It does apply, for the obvious reason that, when the Government has taken exclusive charge of the postal service, prohibiting private competition under severe penalties,† and has invited, if not “virtually compelled,”‡ every citizen to intrust his sealed private communications to its care, it would be not only “unreasonable,” but a breach of faith, shocking to the commonest sense of justice, for it to abuse the confidence thus bestowed in respect of papers accepted by it under the sender’s seal.§ Other reasons of public policy, and especially the encouragement of that “free communion” which fosters civil liberty, while it promotes industry and enterprise, justify the Government in assuming the burdens of the public postal service. But the right of the citizen to be protected, in respect of his private communications transmitted through the mail, against “*unreasonable* searches and seizures,” clearly rests upon the ground first stated—of the faithful performance of a trust.

---

\* 96 U. S. 733.

† U. S. Rev. stat., sects. 3982–3998.

‡ *Ex parte* Brown, 8 Cent. L. J. 380.

§ It was on this ground of public confidence, invited by the Government in establishing the government postal telegraph in 1868–9, that Baron Bramwell, in the Stroud election case, 2 O’Malley & H. 100, 112, refused to order the telegraph officials to produce private telegrams in evidence.

In this respect, also, therefore, the supposed analogy fails between the inviolability (except upon lawful warrant) of sealed letters intrusted to the Government, while in transit through the mail, and that claimed for telegrams remaining in the custody of a private corporation. As to the latter no trust whatever has been assumed, nor confidence invited, by the United States.

If, therefore, it be true that the constitutional guaranty against "unreasonable searches and seizures" of private papers does or should protect telegraphic messages, under any circumstances, from the process of the federal courts if the Federal Constitution be invoked, or of the State courts if appeal be made to the constitution of the State, this must be for some reason which, under the circumstances complained of, would make the search or seizure of such messages also "unreasonable" within such constitutional provision. If such reason do not exist, any supposed analogy of communications intrusted to the mail disappears; if it do, the argument from the Constitution is direct, and that from analogy superfluous.

Next to be considered is the legislation in force in the several States bearing on the present inquiry.

It is unnecessary to dwell upon the statutes relating to the formation, the duties, and the privileges of telegraph companies existing in most of the States, or the powers which many of these confer upon such corporations to condemn and appropriate private property for their own business purposes as for a public use. In some few States the electric telegraph has already been enlisted, as it were, in the service of the courts, civil and criminal. In Texas,\* Nevada,† California,‡ and Oregon§ a warrant of arrest may be transmitted by telegraph, and the telegraphic copy used for service as an original writ. In the three States

---

\* 2 Pasc. Rev. Code, p. 1341 (Cr. Code, art. 6592.)

† 2 Comp. Laws, 1873, p. 317, chap. 121, secs. 3512, 3513.

‡ Penal Code, tit. 14, secs. 619, 639, 640.

§ Gen. Laws 1872 (Deady & Lane), sec. 739 *et seq.*, chap. 58 (Telegraph Companies).

last named any writ or paper requiring service in any civil proceeding may be transmitted by telegraph, and a valid return made on the telegraphic copy; while in Oregon not only may the return of service of a writ sent by telegraph be made also by telegraph, but it is even enacted that any instrument entitled to record may be sent by telegraph, and the telegraphic copy recorded with the same effect as the original; and to this is added the still more extraordinary provision that in such case the burden of proof shall be upon the party denying the genuineness or due execution of the original! Such legislation illustrates forcibly the remarks of Chief Justice Waite upon the importance of this new and extraordinary agency;\* but the present inquiry relates only to legislation touching the secrecy of telegraphic messages.

One of the reasons assigned by Judge Cooley† for opposing “the doctrine that telegraphic authorities may be required to “produce private messages, on the application of third persons” is, “It violates the confidence which the law undertakes to “render secure, and makes the promise of the law a deception.”

It has been seen that no federal law exists relating to the secrecy of the telegraph. If the foregoing proposition is based upon the assumption that statutes exist in all, or even most of the States, absolutely forbidding telegraph employees to divulge the messages intrusted to them, it is not entirely accurate. A careful examination discloses the fact that among the thirty-eight states of the Union there are eighteen‡ in neither one of which exists any statute prohibiting or restricting the disclosure, by telegraph employees or others, of the contents of any

---

\* Pensacola Telegraph Case, 96 U. S. 9.

† Am. L. Reg. (February, 1879), p. 66.

‡ Alabama, Arkansas, Connecticut, Delaware, Georgia, Kansas, Kentucky, Massachusetts, Minnesota, Mississippi, Nebraska, New Hampshire, North Carolina, South Carolina, Texas, Vermont, Virginia, and West Virginia. The provision heretofore cited from the Texas code relates only to affidavits and warrants in criminal cases, which may be sent by telegraph. The disclosure of these by telegraph employees is prohibited, but nothing is said as to private messages. 2 Pasc. Rev. Code, p. 1341 (Cr. Code, art. 6592).

private message intrusted to them ; although in most of these states there are statutes relating in some way to telegraph companies, their privileges and duties, while in a few of them no statute exists affecting such companies at all. In these eighteen states, therefore, this argument wholly fails.

In each of the remaining twenty States some statutory provision exists prescribing secrecy on the part of telegraph employees, but with differences worthy of note.

In the States of California,\* Colorado,† Maine,‡ Maryland,§ Michigan,|| Missouri,¶ Nevada,\*\* New York,†† Ohio,‡‡ Oregon,§§ and Tennessee,|||| respectively, the statutes prohibit telegraph employees from *wilfully* disclosing or divulging the contents of private messages, except, in some of these States, to the person addressed, his attorney, or agent ; in others, to the person addressed or the person from whom received. In Missouri¶ a further exception is made, "or to a court of justice." In Iowa,¶¶ the prohibition is against "intentionally" disclosing the contents of a private message. In Indiana,\*\*\* such disclosure is forbidden, "except to a court of justice, or to a person "authorized to know the same." In Pennsylvania,††† by the Act of April 14, 1851, and in New Jersey,‡‡‡ by an Act literally

\* Cal. Penal Code tit. 14, sects. 619, 639, 640.

† Gen. Laws 1877, sect. 777, p. 312 *et seq.*

‡ Rev. Stat. 1871, p. 467, sect. 1, chap. 53.

§ Md. Code, sect. 20, art. 26.

|| Comp. Laws 1871, secs. 2,640, 7,768.

¶ 1 Wag. Stat., p. 325, sec. 13 ; p. 507, sec. 51.

\*\* 2 Comp. Laws 1873, p. 313, sec. 3,497, chap. 121.

†† N. Y. Stat. at Large (Edwards), 196, 197 (Laws 1867, chap. 871).

‡‡ 1 Sayler's Ohio Stat. 762, sec. 10 (Telegraph Companies).

§§ Gen. Laws 1872 (Deady & Lane), sec. 739 *et seq.*, chap. 58. (Telegraph Companies).

|||| Tenn. Code 1871 (Thomp. & Steg. Comp.), p. 712, secs. 1,322, 1,323.

¶¶ Iowa Code 1873, sec. 1,328, chap. 6, tit. 10, pt. 1.

\*\*\* 2 Rev. Stat. 1876, p. 480, sec. 73.

††† 1 Brightly's Purd. Dig. 336, pl. 107. See 2 *Id.* 1,394, pl. 3.

‡‡‡ Rev. Stat. 1877, p. 1,176, sec. 12 (Acts 1855, p. 544, sec. 1, Telegraph Companies).

copied from the former, telegraph employees are forbidden to make known the contents of any dispatch whatever, without the consent of the sender or the receiver, "upon any pretence " whatever;" and these Acts further enjoin upon all telegraph employees, in relation to all telegrams, "the same inviolable " secrecy as is now enjoined by the laws of the United States " in reference to the ordinary mail service." The penalty, however, is not annexed, as usual, to the violation of this injunction, but is found in the next section, and (alike in the Pennsylvania Act of 1851, and in the New Jersey Act of 1855, still in force) is directed against any telegraph employee who shall "use, or cause to be used, or make known, or cause to be " made known, the contents of any dispatch sent or received " in this State, or *in any wise unlawfully expose another's busi-* " *ness or secrets.*" The Pennsylvania Act of 1851, however, was amended by a subsequent Act\* in some important particulars, which will be separately noticed.

It is pertinent to consider whether statutes like these support such a proposition as that the law has undertaken to render secure the confidence of every sender of a telegraphic message, that its secrecy shall remain absolutely inviolable, even by the process of the courts.

Clearly, no such construction can be put upon the statutes of Missouri and Indiana, since in those two States the injunction of secrecy in terms excepts courts of justice. Omitting Pennsylvania and New Jersey for the moment, the prohibition in each of the other eleven States last named is against the *wilful* disclosure of a message,—the word "intentionally," used in the Iowa statute, meaning the same thing. Can it be said that an operator has *wilfully* disclosed the contents of a dispatch, when in fact he has revealed them because, and only because, required to do so by a court, as a witness on the stand, with the alternative of imprisonment if he refuse? The question is not whether the court would be justified, under such

---

\* Act of May 8, 1855; 2 Brightly's Purd. Dig. 1,394, pl. 3.

a statute, in making or enforcing such a demand, but whether a disclosure made under such circumstances is *wilfully* made, within the meaning of a penal statute? If not, the operator does not disobey the law by making it. But if so, the law contains no such promise nor invites any such confidence in the inviolability of telegrams as alleged; and such seems to be the correct view as to the statutes of the eleven States referred to.

The Pennsylvania statute of 1851, identical with the New Jersey Act of 1855, still in force, was construed immediately after its enactment, in the case of *Henisler vs. Freedman*,\* by the Philadelphia Court of Common Pleas. It was held that the Act should be construed as a whole; that it was aimed only at "unlawful exposures" of another's business; that an exposure of business secrets made by a witness, at the command of a court, in the course of the administration of justice, was a necessary and lawful exposure, not being of a privileged communication, which it was also held that telegraphic messages, as such, are not; and the witness was obliged to disclose the contents of a telegram in his possession as a telegraph manager.† Whether this decision be approved or not, it is clear that no absolute or unqualified assurance of the inviolability of telegrams against legal process can be predicated of the Pennsylvania statute of 1851, nor of the identical New Jersey statute of 1855, still in force.

In 1855, perhaps because of the decision in *Henisler vs. Freedman*, a further Act‡ was passed in Pennsylvania, requiring telegraph companies in that State to preserve all original telegrams for three years, and to produce them in evidence whenever duly subpoenaed to do so *by the senders or receivers*, in any court of

---

\* 2 Pars. Sel. Cas. 274; s. c., Allen's Tel. Cas. 1.

† As the telegram called for was identified by description, and the relevancy of its contents to the pending issue was not disputed, this decision covered only two points, viz.: the proper construction of the statute, and the non-privileged character of telegraphic communications, *as such*: which falls far short of the doctrine of *ex parte Brown*.

‡ Act of May 8, 1855; 2 Brightly's Purd. Dig., p. 1349, pl. 3.

justice, or before any legislative committee, *where such court or committee shall decide them to be material to any issue there pending*; except that confidential communications between attorney and client are in no case to be divulged. The courts of that State have yet to determine the effect of this amendment of the Act of 1851; whether, for example, it amounts to saying that the contents of no private dispatch shall be disclosed, even on the witness-stand, unless called for by the sender or the receiver; nor even then, unless its materiality be made to appear.

As to the remaining five States,—Florida,\* Illinois,† Louisiana,‡ Wisconsin,§ and Rhode Island,||—the statutes of the four first named do in terms prohibit the disclosure, by telegraph employees, of the contents of any private dispatch, without using such words as “wilfully” or “unlawfully,” or any other qualification. That of Rhode Island forbids such disclosure “to a person not authorized to receive the same,”—a somewhat ambiguous phrase, but which may fairly mean, “any person other than the person therein addressed.”

But the question remains, even as to these statutes, whether the doctrine of *ex parte* Brown¶ be not correct,—namely, that, “in the construction of such Acts there is always an implied “exception in favor of legal process,” and that, if the company or its employee discloses the contents of a dispatch because commanded by the courts, “the disclosure is the act of the law, not “that of the company.” On this ground alone it was held in that case that the production of the telegrams called for would not violate the statutory injunction of secrecy, without reference to the exception in the Missouri Act in favor of courts of justice: citing *Lee vs. Birrell*,\*\* where, notwithstanding the witness (a

\* Brush's Dig. Laws Fla. 1871, p. 255, sec. 10. chap. 50.

† Rev. Stat. Ill. 1874, sec. 7, chap. 134.

‡ Rev. Stat. La. 1870, sec. 3763.

§ 1 Stat. Wis., p. 996, sec. 19, chap. 74.

|| Gen. Stat. R. I. (Rev. 1872), p. 548, sec. 36, chap. 230.

¶ 8 Cent. L. J. 378.

\*\* 3 Camp. 337.

collector of the property tax) had taken an official oath not to disclose anything he should learn in that capacity, Lord Ellenborough held that there was "an implied exception of the evidence to be given in a court of justice, in obedience to a writ of *subpœna*," and required the witness to "answer all questions respecting the collection of the tax, as if no such oath had been administered to him."

The result is, then, that so far from uniform State legislation assuring the inviolability of private telegraphic messages, even against legal process, we find that in eighteen States of the Union no telegraph company or employee is under any statutory injunction of secrecy whatever; that in fourteen other States the statutory injunction against their disclosing the contents of messages prohibits only "wilful," or "intentional," or "unlawful" disclosures, implying that under some circumstances, presumably including the command of a court, in aid of justice, the disclosure is within the policy of the law, while in two of these States an exception is expressly made in favor of the courts; that, although in five other States such disclosures are prohibited in unqualified terms, yet none of these statutes place telegraphic messages, as such, on the list of privileged communications, nor make any direct reference to legal process, while the courts thus far hold that in all such prohibitions legal process is by reasonable and necessary implication excepted; and that in the State of Pennsylvania alone do the provisions of the statute seem intended to meet the direct question, under what conditions the courts may compel the disclosure of private telegrams in evidence.

It will require different legislation from this to justify the sweeping proposition that the faith of the law-making power is pledged, either by the nation or by the several States, that telegraphic messages are or shall be inviolable, even by the process of the courts.

Such being the present state of the controversy, and existing pertinent legislation, it cannot be said that either courts or

legislators as yet have solved, upon definite and satisfactory principles, the real question under consideration.

The arguments touching the compulsory search for and production of telegrams in evidence, *pro* and *con*, are equally drawn from principles, each of which must be recognized as among the essential conditions of good government. The former assert the absolute necessity of maintaining the right of the courts to compel the production of written as well as oral testimony, when competent and material, as to which the court, and not the witness, must judge; and further, that this right of the courts can admit of no exceptions, other than those limited classes of communications which public policy requires to be uniformly privileged, without reference to their contents or relevancy to the pending issue. The latter insist upon "the right of the people" [guaranteed, but not created, by the Constitution] "to be secure in their persons, houses, papers, and effects, from unreasonable searches and seizures," and upon not only the manifest *unreasonableness*, but the startling danger to private right and the public welfare, of permitting inquisitorial searches to be made—possibly at the instigation and to serve the ends of a political or business rival, or a personal enemy—into the immense and indiscriminate mass of private, often confidential, correspondence, the accumulation of which in the custody of a private corporation is an exceptional, and perhaps unavoidable, feature of the telegraph system.

Neither side has successfully met the real argument of the other, nor can even deny its weight and pertinency, within proper limits; but neither has reconciled the two by pointing out what those limits are. It remains for the courts of last resort to fulfil that duty in such manner that the current of authority shall not hastily be turned aside from the ancient channels of the Constitution, nor the supposed necessities of public justice be allowed to outweigh other vital considerations of the public welfare.

The fundamental proposition in support of the right thus

maintained for the courts, on the one hand, is one which cannot be questioned for a moment. The case of *Amey v. Long*, 9 East, 473, decided in 1808, turned directly upon the question whether a writ of subpoena *duces tecum* was of compulsory obligation. Lord Ellenborough delivering the unanimous opinion of the Court of King's Bench, upon motion in arrest, after full consideration, said :—

“The right to resort to means competent to compel the production of written as well as oral testimony seems essential to the very existence and constitution of a court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them. And it is not possible to conceive that such courts should have immemorially continued to act upon both, without great and notorious impediments having occurred, if they had been furnished with no better means of obtaining written evidence than what the immediate custody and possession of the party who was interested in the production of it, or the voluntary favor of those in whose custody the required instruments might happen to be, afforded.”\*

This unanswerable statement of the reason and necessity for such a power has ever since been recognized as the law.† It follows that the burden is upon those who deny the right of the courts to compel, by a subpoena *duces tecum*, the production of telegrams in evidence, to show why, or under what circumstances, this species of private writings should be excepted from the general rule.

It is to be observed, however, that in *Amey vs. Long*, the question was raised and decided only upon the most general grounds. There was no doubt as to the materiality of the paper called for, no suggestion that it was privileged, nor that it was in any way confidential, nor of any inconvenience to any third person from its production, nor that the issue of the writ was improper or improvident upon any ground of public policy.

---

\* 9 East, 484.

† 1 Whart. on Ev., sec. 377; 1 Greenl. on Ev., sec. 558; 2 Tidd's Pr. 806; *Bull v. Loveland*, 10 Pick. 14.

Lord Ellenborough's statement of the rule, therefore, assumed the existence of every condition which could justify the exercise of the power, and simply announced the general principle upon which it ultimately rests. But, even in doing this, he distinguished the case of *Miles vs. Dawson*,\* where Lord Kenyon refused to compel a witness to produce a power of attorney in his possession; saying that this case—

\* \* \* “establishes, in principle, nothing more than this: “that there are circumstances in respect of which the production of an instrument, required in the terms of a subpoena, “would not be enforced by the authority of a court; which is a “proposition too clear to be doubted. \* \* \* It is in every “instance a question for the consideration of the judge at *Nisi Prius*, whether, *upon principles of reason and equity*, such “production should be required by him; and of the court afterwards, whether, having there been withheld, the party should “be punished by attachment.”

The true doctrine of *Amey vs. Long* is, therefore, by no means an unqualified assertion of the right of the courts to compel the production of papers in evidence by third persons, under all circumstances. Stated with reference to its proper foundation and just limits, it might, perhaps, take some such form as this:

*That a court of law, when engaged in administering justice, by determining facts in dispute between parties before it, in order to apply to those facts, when ascertained, appropriate rules of law, has the right to compel witnesses to attend and give competent and relevant testimony in their possession, whether oral or written, touching the facts material to be determined; which right of necessity includes the power to compel such witnesses to produce in evidence private writings or documents in their possession,—not being privileged,—the disclosure of whose contents appears to be a necessary part of the testimony so required.*

If this be a correct statement of the doctrine of *Amey vs. Long*, and of the conditions under which it applies, it may serve as a guide in determining the just limits of the power in ques-

---

\* 1 Esp. 405.

tion. When Lord Ellenborough declared that *in every instance* it behooved the court to determine whether “the principles of reason and equity” required the compulsory production of any paper, he certainly intended that unless such conditions were fulfilled the court had no right, in any case, to put forth such a power. Lord Redesdale, speaking of discovery in equity, tersely stated the true functions of courts of law, also, in compelling the disclosure of facts, in saying:—

“As the object of the court in compelling a discovery is either *“to enable itself or some other court to decide on matters in dispute between the parties, the discovery sought must be material either to the relief prayed by the bill, or [in suits for discovery only] to some other suit actually instituted, or capable of being instituted.”\**

The arguments against the compulsory production of telegrams have been made vulnerable by a failure to distinguish between those cases in which the power of the court may be legitimately employed to compel the production of evidence called for with certainty, and competent and relevant when produced, and those in which it is invoked for the very different purpose of searching through papers in the possession of third parties in order to find out whether any and which of them can be used in evidence. In the former, the purpose is just, the right undeniable. In the latter, the purpose is inquisitorial and oppressive, and the power at variance with the essential conditions of free government, as well as with fundamental principles of common law and constitutional right. The distinction is a vital one, however difficult its application may sometimes be. It cannot be disregarded on either side without leading to mistaken and mischievous conclusions.

If the opponents of the compulsory production of telegrams had confined their argument to enforcing the constitutional guaranty against unreasonable searches and seizures, it is

---

\* Mitford's Eq. Pl. 306. See Hare on Discovery (2d ed., 1876), 136, chap. 2, sec. 1.

difficult to see how it could have been answered. In fact, in the Barnes case\* and in *ex parte* Brown† their argument to that end was not answered, and in no other reported case was this question raised. In the former, the House Judiciary Committee made no other reply to it than the evasive (one is tempted to say, flippant) assertion that, “in the hundreds of “cases in which a subpoena *duces tecum* has been resorted to “[by courts and legislatures], the similarity which the witness “supposes to exist between that writ and the general warrants “condemned by the Constitution has never yet been detected.” In *ex parte* Brown, the constitutional argument was treated as scarcely relevant, in virtue of what seems a singularly narrow construction of that constitutional provision, presently referred to.

Unfortunately, the tendency of other arguments employed against the power in question is in direct conflict with the true doctrine of *Amey vs. Long*, and would not only prevent the abuse, but deny under any circumstances the application to telegrams, of the power there asserted,—as, when Judge Cooley lays it down‡ that “the public are not entitled to it” [private correspondence by telegraph] “for *any purpose*.” None of the reasons in support of so broad a statement appear to be sufficient.

For example, an argument is drawn by analogy from the inviolability of letters in the mail. But we have seen that this analogy will not bear examination. If it rests upon the postal statutes, they protect letters only during actual transit in the mail, and this, for reasons which do not apply to telegrams at all. Nor can it be inferred from the doctrine of *Ex parte* Jackson, above cited,—namely, that sealed letters, *while in the mail*, are within the guaranty of the Constitution as to unreasonable searches and seizures,—because the trust assumed

---

\* Cong. Rec., vol. V., pt. 1, p. 604.

† 8 Cent. L. J., No. 19, p. 378 (April 29, 1879).

‡ Const. Lim., p. 307, note.

and confidence invited by the government, which would make the search or seizure of sealed letters, while in the mail, "unreasonable," do not exist in respect of telegrams remaining in the custody of a private telegraph company. The two English election cases\* in which the court refused to compel the production of private telegrams went on the precise ground that, by the establishment of the postal telegraph, the government had invited a confidence on the part of the senders of telegrams which it would be against public policy to violate. If, therefore, the Constitution does protect telegrams from search or seizure, as well as sealed letters *while in the mail*, this must be for some reason independently applicable to telegrams as such; and thus, in that regard also, the supposed analogy fails. Moreover, it is held in *ex parte* Jackson that even sealed letters in the mail are subject to search and seizure, provided the prohibition of the Constitution against "nameless warrants" be observed. It is only "*unreasonable* searches and seizures," whether of persons, houses, papers, or effects, which are forbidden.

So, the argument from the supposed statutory injunctions against disclosure by telegraph employes, if sound, should include all telegrams, under all circumstances. But we have seen that this argument wholly fails in eighteen States, because in neither of them any such statute exists; and the statutes prescribing secrecy which exist in the other States, whether unqualified in terms or not, are fairly susceptible of a construction, and the courts have uniformly construed them,† in harmony with the doctrine of *Amey vs. Long*.

The argument from the confidential character of telegrams as between the parties to them, and the express or implied pledge of secrecy by the telegraph companies, is still less satisfactory. It assumes that the law respects as privileged, with-

---

\* Taunton Case, 2 O'Malley & H. 72; Stroud Case, *Id.* 100, 112.

† *Ex parte* Brown, 8 Cent. L. J. 378; *Henisler vs. Freedman*, 2 Pars. Sel. Cas. 274.

out regard to their contents or relevancy to the pending issues, all communications which the parties to them intend shall be secret or confidential. It must amount to this, or to nothing. But it is perfectly well settled that no communication, however confidential, or growing out of personal, social, or business relations however intimate, is for that reason protected from disclosure on the witness stand, unless it fall within one of the special or limited classes which the law itself makes privileged for reasons of public policy.\*

In truth, all these arguments amount simply to the claim that private telegraph messages, *as such*, without reference to their contents, constitute a new class of privileged communications. But no statute gives color to any such claim, and the courts have uniformly denied it.† In each of the cases cited‡ the telegrams called for were specified, and were shown or admitted to be relevant. In none of them was the constitutional question raised. The controversy was narrowed in all of them to the single question, whether a private message, the fact and contents of which are confessedly relevant to pending issues, and otherwise competent, is to be classed with privileged communications,—such as those between attorney and client, husband and wife,—on the sole ground that it was transmitted by electric telegraph, instead of by letter, or by word of mouth. The decision was necessarily against such a claim. The familiar reasons of public policy which make certain classes of communications uniformly privileged, without regard to their nature or contents, obviously have no application to telegraph messages *as such*. Said the court in *Henisler vs. Freedman*:—§

“The wife and husband are not permitted to testify against

---

\* Whart. on Ev., sec. 607; *Corps vs. Robinson*, 2 Wash. C. Ct. 389; *Burnham vs. Morrissey*, 14 Gray, 240.

† *Henisler vs. Freedman*, 2 Pars. Sel. Cas. 274; s. c., Allen's Tel. Cas. 1; *The State vs. Litchfield*, 58 Me. 267; s. c., Allen's Tel. Cas. 494; *National Bank vs. National Bank*, 7 W. Va. 544.

‡ *Ibid.*

§ 2 Pars. Sel. Cas. 276; s. c., Allen's Tel. Cas. 3.

“each other, nor is the counsel permitted to reveal the secrets  
“of his client, because otherwise the most important social rela-  
“tions could not effectively exist. The claim that society has  
“on the testimony of all its members, in courts appointed to  
“administer public justice, is made to give way in such cases  
“to the maintenance of other great relations, in which the  
“public are even more interested.”

How can it be said that if A., wishing to communicate with B., chooses to transmit his thoughts by electric telegraph instead of by oral or written message, he thereby creates or enters into *a relation with B.*, which it is the paramount interest of society itself to protect, by making privileged and inviolable every communication *transmitted in that manner*, without reference to its contents, even at the expense of the regular administration of justice? Such a rule, if prescribed at all, must be uniform; every communication sent by telegraph must be privileged, as is every communication between attorney and client, or husband and wife. But why should a given message, which, if orally communicated or delivered through the mail, would be subject to compulsory disclosure, become a privileged communication if sent by telegraph? This would be discriminating, not in the interest of the parties concerned, or of society at large, but of the business of the telegraph companies. Public policy, in respect of what communications shall be privileged, has nothing to do with the mode of their transmission, nor with the motive of its selection, nor with the desire of either or both parties for secrecy, but solely with the consequences to society at large of permitting or prohibiting their disclosure in aid of justice. In order, therefore, to support the claim that telegraphic messages, as such, should be held privileged communications, it must be shown that unless they are, the electric telegraph cannot be generally made available as a medium of communication, and also that this consequence would be more injurious to society than the denial to the courts of this means of attaining the truth. But the former proposition is untrue, as experience demonstrates; and as to the latter, the unques-

tionable danger of abuse is to be met by applying, not by perverting, sound legal principles.

On the other hand, the immensely increased facilities for crime, and the grave obstructions to public justice which would result from placing telegraphic messages, as such, on the list of privileged communications, are forcibly stated by the court in the cases already cited, *The State vs. Litchfield*, and *Henisler vs. Freedman*. And the answer made to this by Judge Cooley,\*—namely, that the United States postal laws do now protect the correspondence of criminals transmitted through the mail, incidentally, indeed, but because in the interest of society at large all private correspondence should be inviolable—is met (as we have seen) by a two-fold reply: that the public policy which protects all private correspondence *while passing through the mail* does not rest upon the particular mode of transmission,—*i. e.*, by written as distinguished from oral message,—nor upon any relation between the sender and receiver, but upon a trust voluntarily assumed, and public confidence invited by the government itself; and, also, that from the moment this trust is fulfilled, all such correspondence, not otherwise privileged, does at once become subject to the process of the courts, under proper lawful conditions.

It seems clear, therefore, that the arguments which would not merely confine within its true limits the doctrine of Lord Ellenborough in *Amey vs. Long*,† but deny its application under any circumstances to telegraphic messages, have been rightly disregarded by the courts.

But the House Judiciary Committee in the Barnes case,‡ and the St. Louis Court of Appeals in *ex parte Brown*,§ have carried that doctrine to the opposite extreme.

It was maintained in these cases, in effect, that it is compe-

---

\* Am. Law Reg. 72 (February, 1879).

† 9 East, 473.

‡ Cong. Rec. vol. V., pt. 1, p. 604.

§ 8 Cent. L. J. 378.

tent for a court, or for a legislative committee, not only to compel the production by a third party, under a subpoena *duces tecum*, of private papers in his possession, the competency and relevancy of whose contents are at least *prima facie* established, but also to compel the manager of a telegraph company to search for and produce the originals or copies of all telegrams which, during six months preceding, may have passed between persons not before the court, without reference to their contents or subject-matter, and without even *prima facie* proof of their competency or their relevancy to any issue pending, in order that the court, or a grand jury, or a legislative committee, may inspect them all, and find out which, if any, are competent for any purpose, and relevant to the matter under examination. The former proposition is the true doctrine of *Amey vs. Long*; the latter, we repeat, is something wholly different and untenable.

In answer to the argument of counsel, that such an enforcement of the writ would be an "unreasonable search and seizure" of private papers within the prohibition of the Constitution, the court said, in *ex parte Brown*, that the eleventh section of the Missouri Bill of Rights (identical with the fourth amendment to the Federal Constitution)—

\* \* \* "has little bearing upon the present question, except by way of argument and illustration. \* \* \* Apart from the general nature of the warrants, which was the great evil and the decisive ground of illegality,—a truth which is perpetuated in the language of the constitutional provision,—the point was the indiscriminate seizure of all papers which the accused preserved in the privacy of his home, and the illegality of compelling, by force, the communication of the contents of those papers, thereby constraining the person, so far as the papers availed against him, to become his own accuser."

The court also say :—

"It is further urged that there is no sufficient or certain description of the papers required. \* \* \* But the obligation of secrecy imposed by law on the grand jury is a sufficient answer to the objection that the subject-matter of the dispatches is not indicated."

The limits of this paper forbid more than a brief statement of some reasons why the power asserted in the two cases referred to does not belong to the courts, and is within the prohibition of the Constitution.

1. No such power is asserted or implied by the ruling in *Amey vs. Long*. That case assumes that the evidence called for is at least *prima facie* competent and relevant. But the very object of this compulsory search is to find out whether the suspected papers contain such evidence, and this in disregard of the rights of third parties, and of the "principles of reason and equity" appealed to by Lord Ellenborough. A subpoena *duces tecum* issued under such circumstances, and for such a purpose, --fishing for evidence on suspicion, without proof,--is the very counterpart of a search-warrant obtained to hunt for goods not even alleged to have been stolen, and without any of the prerequisites which the Constitution exacts even from criminal justice.

2. The plea that such a power will always be exercised in the sound discretion of the court does not meet the objection, even were it not always dangerous to enlarge that discretion in matters of personal right. But the function of a court to determine whether evidence proposed to be offered is admissible, is something completely different from this alleged right of a court to order the private papers of a third person to be searched or produced, in order that the court, by inspecting them, may determine whether they contain admissible evidence. The one is a judicial duty; the other an inquisitorial and irresponsible power, always liable to inflict grave and unjustifiable injury on third parties. No such right can belong to a court without at least *prima facie* proof that the papers called for, being also particularly described, are competent and relevant; for it is precisely on that assumption that the right to compel their production, in aid of the administration of justice, depends. It is begging the question, therefore, to reply that the court will exercise a sound discretion in the inspection and disposition of

private papers thus forcibly brought before it on suspicion of their relevancy, when it does not yet appear that the court has any right to examine those papers at all.\* Doubtless it is a very grave and difficult practical question—probably the turning-point of the whole controversy—just when that right of the court does exist. Like many other practical questions in the administration of justice, it cannot be answered beforehand for each case, any more than an exact statement can be made of the circumstances necessary to constitute fraud, or to impart constructive notice, or of the length of “a reasonable time.” What *can* be done is to distinguish clearly the “principles of reason and equity,” and of constitutional right, by which, *in every instance*, as Lord Ellenborough said,† courts must be guided in the exercise of such a power; to recognize the dangers which environ it, and to provide such safeguards—as definite as may be—as will reduce these to the *minimum* of possible injustice and wrong.

3. The doctrine of *ex parte* Brown is inconsistent with the established principles of evidence, whether at law or in equity.

*a.* At common law, the fundamental theory on which the pleadings were made up was the elimination from the case of all matters not essential to the precise dispute between the parties. As to the evidence, nothing is admissible which is not relevant to the issues thus framed.‡ Nothing else is evidence

---

\* Lord Denman, in *Doe vs. James*, 2 Mood. & R., 47, refused to order an attorney to produce a will left with him by a client; and to the argument that it might, on inspection by the court, prove to be a will of personalty, which ought to have been proved, and, being thus made public, would not be within the professional privilege, said: “It is suggested that it is a will of personalty, and that I may refer to it to ascertain whether the fact be so; but I do not think that a judge has any more privilege to examine the document than any one else. I cannot call on the witness to produce it.” This ruling was cited approvingly by Maule, J., in *Volant vs. Soyer*, 13 C. B., 235.

† *Amey vs. Long*, 9 East, 473.

‡ 1 Greenl. on Ev., sec. 51; *Malcolmson vs. Clayton*, 13 Moore P. C. 198; Stephen's Dig. of Ev. (1876) p. 4; Whart. on Ev., secs. 25, 29.

in the cause, and the compulsory power of the court can rightfully extend to nothing else. It cannot, therefore, be rightfully invoked *in invitum* by either party, unless *bona fide* invoked for that purpose; and that such is the fact should be first made to appear, as well as to establish the right as to guard against its abuse.

b. In equity, the power of discovery has always been strictly limited to matters apparently material to the plaintiff's case. The first two of Vice-Chancellor Wigram's five propositions\* of the Law of Discovery insist on this condition. Mr. Hare† cites Lord Redesdale‡ to the like effect,—which, indeed, is familiar law. The same doctrine is held, more strongly, if possible, in respect to private papers; and such chancellors as Redesdale,§ Loughborough,|| Eldon,¶ and Thurlow,\*\* have recognized the mischiefs attending their unnecessary production and inspection. Said Lord Loughborough, in *Shaftesbury vs. Arrowsmith*:††

“Permitting a general, sweeping survey into all the deeds of  
“a family, must be attended with very great danger and mis-  
“chief. \* \* \* It may set up a title, not for the benefit of  
“plaintiff, but to the injury of the devisees, *indulging a specula-  
“tion to the prejudice of parties whose interest this court has no  
“right to invade.*”

Lord Thurlow, having at first held‡‡ that negative pleas were not good in equity, changed his opinion, and admitted them;§§ which, Lord Redesdale states,|||| was on the express ground

\* Wigr. on Disc. 15, 16. The learned author, in opening his treatise, says (p. 2): “The exercise of a jurisdiction of this nature cannot be otherwise than  
“pregnant with danger to the interests of those against whom it may be en-  
“forced, unless careful provision be made for guarding against its abuse.”

† Hare on Disc. (2d ed., 1876) p. 136, chap. 2.

‡ Mitford's Eq. Pl. 306.

§ *Id.* 241.

|| 4 Ves. 66, 71.

¶ *Cock vs. St. Bartholomew Hospital*, 8 Ves. 141.

\*\* *Hall vs. Noyes*, 3 Bro. C. C. 483, 489.

†† 4 Ves. 66, 71; s. c., Langd. Cas. in Eq. Pl. 380.

‡‡ *Gun vs. Prior*, 1 Cox, 197.

§§ *Hall vs. Noyes*, 3 Bro. C. C. 483, 489.

|||| Mitford's Eq. Pl. 241.

that by compelling an answer and discovery to every bill, however false its suggestions, "the title to every estate, the transactions of every commercial house, and even the private transactions of every private family, might be exposed; and this might be done in the name of a pauper, at the instigation of others, and for the worst of purposes." But, may not even greater mischiefs attend the enforced and indiscriminate production of private telegrams accumulated on the files of a company? A defendant in equity might at least refuse to answer interrogatories not apparently material to the plaintiff's case, but this unrestricted power of search drags every relevant and irrelevant message into court.

4. The possibilities of abuse become still greater when the indiscriminate information thus obtained is submitted, not to a court, but to a committee of investigation, or to a grand jury. It is not wise to put too severe a strain upon the virtue even of statesmen, nor absolutely certain that every such committee will scrupulously guard the secrets, perhaps of personal or political rivals, not relevant to the inquiry in hand, which the sifting of six months' accumulated telegrams might reveal. As to the grand jury, the obligation of secrecy imposed on them by law by no means sufficiently answers the objection to an indiscriminate seizure of telegrams for their inspection. That obligation relates to matters supposed to come legitimately to their knowledge. It does not authorize nor justify them in compelling confidences which their duties do not require. Such a plea concedes the right of every man to be protected from any unauthorized exposure of his private affairs. And since the wrong done him by such an exposure does not depend on the number or office of those to whom it is made, but on the fact that it was unauthorized,—as the right of action for a libellous letter is complete if it be published but to one person,—the wrong is complete, and the mischief may be irremediable, though it be made to the grand jury alone. Moreover, while it is true that in Missouri grand jurors cannot

testify as to what took place before them, except to impeach a witness or to support a prosecution for perjury,\* the law is different elsewhere. In Mississippi,† grand jurors are bound by no oath of secrecy. In Massachusetts,‡ Indiana,§ Pennsylvania,|| and North Carolina,¶ and perhaps in other states, it is held on general principles of public policy that, notwithstanding his oath of secrecy, a grand juror may be required, both in criminal and civil cases, to testify to matters which came before him as such; and Mr. Bishop, reviewing these cases, maintains the true principle to be, that after the person indicted is under arrest, the grand juror's obligation of secrecy should yield to the duty of disclosure in the interest of justice.\*\* Thus by no circuitous route, the compulsory disclosure to a grand jury of irrelevant private telegrams might lead to that very "evil and illegality" of general warrants deprecated by the court in *ex parte Brown*,†† the constraining a person, by the enforced production of his private papers, to become his own accuser.

5. This "evil and illegality" of general warrants, said the court in that case, was the evil chiefly aimed at by the constitutional guaranty against "unreasonable searches and seizures" of private papers, namely, "the indiscriminate seizure of private "papers preserved by a man in the privacy of his home, thereby "forcibly compelling the communication of their contents," and furnishing proof against himself. And it was further said that telegrams are not within this constitutional provision, because they are not kept private at home, but have been voluntarily communicated to the telegraph operator. Waiving the question whether a communication can be called voluntary without

---

\* *Beam vs. Link*, 27 Mo. 261.

† *Bishop's Cr. Proc.*, sec. 858, note 1.

‡ *The Commonwealth vs. Mead*, 13 Gray, 170.

§ *Shattuck vs. The State*, 11 Ind. 477.

|| *Huidekoper vs. Cotton*, 3 Watts, 56.

¶ *The State vs. Broughton*, 7 Ired. 96.

\*\* 1 *Bishop's Cr. Proc.*, sec. 859.

†† 8 Cent. L. J. 378.

making which the telegraph is wholly unavailable, this argument is unsound. Every paper belonging to himself which any man desires to keep private, and communicates to no one except confidentially, for his own private purposes, remains a private paper so far as either third parties or the law is concerned, *until some lawful reason and necessity arises for that paper to be made public*. The personal right of privacy in respect of one's papers is as truly invaded, and an enforced search into their contents is equally "unreasonable," within the meaning of the Constitution, whether such papers be indiscriminately seized in the owner's house, or without some lawful reason therefor are indiscriminately seized from the confidential keeping of a telegraph company, by means of a subpoena *duces tecum*, and delivered to a court, or grand jury, or legislative committee, for inspection at will.

6. But such a construction of that constitutional guaranty as thus suggested by the court, is altogether narrow and misleading. The second clause of the fourth amendment (which is the type of the provision in the State constitutions) does in terms prohibit the issue of general warrants except upon probable cause, on oath or affirmation, particularly describing the place, person, or thing, etc. But that clause, aimed at a specific abuse and custom of oppression which Wilkes's case had made prominent, neither defines nor limits the broad declaration of personal right contained in the clause preceding. The latter purports, not to confer, but to recognize and guarantee the fundamental "right of the people to be secure in their persons, "houses, papers, and effects, from unreasonable searches and "seizures." It asserts, not only the sacredness of home from unlawful invasion, but the larger personal right of protection against arbitrary power in person and property, wherever situate, of which the sacredness of home is only one form. Doubtless that right must yield, whether as to the person or the property of the individual, whenever the safety or the welfare of the community demand the sacrifice; but for this some

reason must exist which the law deems sufficient; or else the demand, the search, the seizure is "unreasonable" and unlawful, though neither its object nor its effect be to procure evidence of crime, or to make a man his own accuser. Inquiring further, we find that even search-warrants issued in conformity with this provision are permitted only in aid of criminal justice, and not of civil demands; and accordingly, in *Robinson vs. Richardson*,\* the Supreme Court of Massachusetts said:

"All searches, therefore, which are instituted and pursued upon the complaint or suggestion of one party, into the house or possessions of another, in order to secure a personal advantage, and not with any design to afford aid in the administration of justice in reference to acts or offenses in violation of penal laws, must be held to be unreasonable, and consequently, under our Constitution, unwarrantable, illegal, and void."

7. But the compulsory production of a mass of telegrams, contents unknown, in order to find out what evidence, if any, they contain, is a peculiarly "unreasonable" and dangerous abuse of power. The simple fact of their indiscriminate accumulation exaggerates the dangers which courts of equity so carefully guard against in granting discovery. Those dangers and mischiefs are pointed out with great force in Judge Cooley's article, above mentioned. He says:

"Telegraphic communication, if not inviolable, offers a perpetual temptation to malice. A legislative committee may employ the power of calling for it to blacken the reputation of an opponent; a business rival may be annoyed, and perhaps seriously compromised, by means of it; a family feud may be avenged or quickened by bringing out confidential messages, and so on. All that is requisite is a suit, and a magistrate not over-nice respecting the admissibility of evidence, and the messages are always at hand, ready to be called for. To get letters it might be necessary to resort to stratagem, and perhaps to violence. It is idle to say that these are merely fanciful and wholly improbable cases; they may occur at any time when the interest or the malice of

---

\* 13 Gray, 456. See also 1 Bishop's Cr. Proc., sec. 240; Cooley's Const. Lim. 307, note 1.

“others is sufficiently powerful to instigate proceedings which  
“in law are baseless. Even the judge may not be able to pro-  
“tect the party whose communications mischief or malice would  
“drag before the public; for, as Mr. Justice Maule observed,  
“in a case where an attempt was made to require an attorney  
“to produce the title-deed of a third person, if the judge were  
“to decide that it was not a proper instrument of evidence,  
“his decision might be made the subject of argument in open  
“court, by a bill of exceptions; and thus the contents of the  
“deed might be communicated to all the world.’ *Volant vs.*  
“*Soyer*, 13 C. B. 231, 235.”

It is quite true that inconveniences may result from the lawfully enforced production of private papers, including telegrams. But the reason is so much the stronger why the law should not be violated to make the evil greater still.

8. A further objection to the indiscriminate compulsory production of telegrams has been already quoted from Judge Cooley's article,—in effect, that to the extent that it may discourage correspondence, it is against the policy of the law, as being a restraint upon industry and enterprise, and also upon intimate family and social intercourse. Such a result is at variance, not only with the policy of the law, but with that “primordial right of free communion” maintained with so great ability and learning by Dr. Francis Lieber in his “Political Ethics,”\* and again in his “Civil Liberty and Self-government,”† as being not only “one of the most precious and necessary rights of the individual,” but also “one of the primary elements of civil liberty.” This right he shows to include free letters, as well as free speech and a free press,—*free*, in the sense of being exempt from arbitrary, malicious, or mischievous intermeddling, no less than from the graver wrong of downright suppression. In this respect a real similarity exists between correspondence by letter and by telegraph. The wrong and the evil of “unreasonable searches and seizures” in either case are alike, though the circumstances of illegality may be

---

\* Page 183 (2d ed.)

† Chap. 9, p. 108.

different; and the public indignation which would surely and swiftly flame out in the one case ought to be not less prompt and unsparing in the other. But the "right of free communion" does not in either case imply an exemption from those disclosures, however inconvenient to individuals, which the due administration of justice and the execution of process issued under lawful conditions must from time to time require. It is only by enforcing this distinction that the courts can fulfil their own duty, while also guarding those fundamental rights whose strenuous and successful assertion against arbitrary power was "the great glory of the common law,"\* and which were thence engrafted upon our American constitutions.†

The considerations above presented appear to justify the following conclusions :

I. Telegraphic messages, however confidential, do not, *as such*, constitute a class of privileged communications. Remaining in the custody of the telegraph company, they are subject to compulsory production for use in evidence, under process lawfully issued, whenever those conditions are fulfilled, in respect of the case in hand, which must exist in any case to render lawful the exercise of such a power.

II. The right of a court to compel by subpoena *duces tecum* the production in evidence by third parties of private writings, described with certainty, and first shown to be at least *prima facie* relevant and competent, does not include any right to order search for, or compulsory production of, papers not thus brought within the lawful power of the court; and the compulsory search for and enforced production by third parties of such papers, in the absence of such certainty and proof, is an "unreasonable" and unlawful search and seizure, within the meaning of the Constitution.

III. The exceptional features of the telegraph service, including the virtual necessity for its use by the public, and the

---

\* Sedgw. on Stat. & Const. Law, 267, note *a*, 271.

† 2 Story on Const., sec. 1902.

unavoidable accumulation of private messages in telegraph offices, give rise to exceptional danger of abusing even the lawful power of the courts, and devolve upon them the duty of exceptional precautions in its exercise. And in view of the apparent tendency of the decisions, this judicial duty should be defined and enforced without delay by appropriate legislation.

IV. The telegraph service of the country, as an indispensable agency of commercial intercourse among the States, has been held by the Supreme Court to be clearly within the grant of congressional powers. Congress should exercise that power in this regard, not necessarily by assuming the service of the telegraph, a completely distinct question not involved in the present discussion, but by such uniform regulations as will protect those who use it, not only against unauthorized disclosures by telegraph employees, but also from interference by state legislation, or by any court, with the lawful right of free communion, and from "unreasonable searches or seizures" of such communications under color of civil or criminal process.

V. Such regulations should prescribe, as precedent to the exercise by any court of the power in question, conditions which shall effectually distinguish the lawful right to compel the production of relevant and competent evidence from the inquisitorial and oppressive power of searching among, or compelling the production of, private papers of third parties, to find out what evidence they may contain. Among these should be included:

*a.* An affidavit of the party applying for such writ, at least upon information and belief, of the existence, the sufficiently certain description, and the alleged or supposed contents of the dispatches called for, showing their relevancy in the cause.

*b.* Reasonable notice of such application, so far as practicable, to any third person, sender or receiver of such telegram, and reasonable opportunity to show cause against the same.

c. In addition to the criminal penalty for false swearing in any such affidavit, a right of action for exemplary damages against any person wilfully or maliciously procuring, by means of such process, the unnecessary disclosure of any private message.

VI. Effectual provision should also be made against the like abuse of power by any legislative body or committee thereof. The constitutional right of such bodies to take and compel testimony touching facts, the knowledge of which is requisite to the fulfilment of their constitutional duties, is not denied, and was convincingly affirmed by the Supreme Court of Massachusetts in *Burnham vs. Morrissey*; \* but it was also there held that such bodies are not the final judges of their own powers and privileges in cases involving the rights and liberty of the citizen, their action in that regard being subject to the review of the courts. The legislative recognition of the principles already discussed would doubtless go far, in future, to prevent the necessity for judicial interference in such cases.

It only remains to be said that, if the suggestions thus presented are sound in principle, it is full time for their consideration both by courts and legislators, and for the restraint within just and constitutional limits of a judicial power whose abuse—whether wilful or negligent, and no matter how instigated or procured—is as dangerous to personal right as its due exercise is necessary to the administration of public justice.

---

\* 14 Gray, 239.



## PAPER

READ BY

GEORGE A. MERCER.

---

### *The Relationship of Law and National Spirit.*

The very intimate and philosophical connection subsisting between the laws and the spirit or temper of a community, though sufficiently obvious to reflection, often escapes or eludes casual observation.

It requires some study and thought properly to appreciate and exhibit the vital importance to every political fabric of a healthy national temper, as the support, guardian, and interpreter of its legal institutions. The spirit of a community, in the largest sense, represents its prevailing opinion and feeling; it signifies the views of the people in relation to their various interests; the motives by which they are governed, and the prejudices by which they are controlled. It is compounded of various elements—interest, habit, pride, prejudice, all enter into its composition. It is moulded by the pursuits and circumstances of the people, by climate, situation, government, and laws.

The spirit of a community is generally quite correctly delineated by the legal institutions of the country; they yield in time to its creative or plastic influence, and express, with fidelity, the moral aspect of the people they constrain. Nothing, for example, could more forcibly indicate the corruption of the Athenian spirit than the law which made it a capital crime to propose the application to purposes of state of the money designed for the theatre. Unjust and oppressive laws, no nation,

animated by sentiments of liberty, will bear ; mild and beneficent institutions, no corrupt and servile people will retain.

The spirit of liberty, which began to prevail in England after the immediate depression of the conquest had passed away, resented the imposition of the arbitrary feudal regulations, and by the constant friction of public opinion adjusted them to the free temper of the nation. The harsh and oppressive consequences of subjugation were gradually displaced, and just and proper laws substituted in their stead. But these very laws, during the arbitrary reign of the Tudors, when the national spirit had been palsied by the sufferings of civil war, were abrogated or disregarded. Every barrier that had been erected for the protection of the people was leveled. The accommodating temper of the governed kept pace with the spirit of royal usurpation. The Parliament, in their terror, enacted that the proclamations of the king should have the force of laws, and "an amazing heap of wild and new-fangled treasons" were prepared to entrap the indiscretion of the citizen. But the free and manly temper, which has preserved British liberty through so many political convulsions, was not extinct. It again animated the soul of the nation. The feeble ripples which at first chafed, rather than commanded, the will of the ruler, again swelled with the power and majesty of the ocean. Public sentiment, enfranchised and strengthened, resisted the encroachments of power ; and, during the reign of the Stuarts, arbitrary and oppressive laws were repealed or accommodated to the altered spirit of the nation.

The same intimate connection between the legal institutions and the public temper of a people may be traced in the history of the ancient states, and the vitiation of the latter can be readily recognized by the changes that were made in the former. Some monuments of Grecian and Roman freedom survived for a time the spirit that produced and upheld them, but finally they were perverted from their true design or crumbled into ruin when their support had been withdrawn. It is true that the

form and letter of the law will sometimes be retained after the vitalizing spirit has disappeared.

The Roman people continued to address as consul the ruler who wielded the power of a king, and the English invested with all the show of absolute authority the royal person whose predecessor they had hurled from the throne. The enslavement of a nation, which retains the legal monuments of freedom, is therefore not impossible, but it is rare and only temporary. Sooner or later the spirit of a people must exhibit itself in their laws. The ancient writers attributed great efficacy to public manners, using the term in a broad sense, to denote the mental and moral characteristics and habitudes of men collected together into societies.

But the manners of a people are only its spirit in action. They are the more direct and immediate effect of that public temper which exhibits itself in the laws. Political writers have dwelt much upon the fatal effects of a corruption of manners, and luxury and vice have been assigned as the fruitful causes of national ruin. But corrupt manners are a result rather than a cause. National decadence is due not so much to the influence of luxury and vice as to the corrupt spirit which they indicate and out of which they grow. Vicious practices may sometimes be obstructed or corrected, but though the symptoms be suppressed, the fatal malady remains where the vital spirit is diseased.

The connection between the laws and the spirit and manners of a people being therefore of the most intimate nature, so that the vigor and purity of the former cannot co-exist with the corruption of the latter, the following propositions necessarily result—

*First.* It is impossible to introduce and maintain good legal institutions among a people whose spirit is debased and unprepared to receive them. Take, for example, as the strongest illustration which presents itself, a purely despotic government. Montesquieu has shown that the spirit of a despotic government

is fear. In this state, therefore, the fountain of public virtue and happiness is poisoned in its source. A free spirit is the ruin of such a government; a servile temper is its strength. It can endure only by the systematic corruption of all political virtue. Established upon the permanent debasement of the people, those generous and aspiring qualities, which are to free nations the source of unbounded strength, only threaten this with destruction. The disposition to protect one's rights is a constant assault upon the state; the very notion of right must be extirpated from the mind. The laws that are suffered to exist are known only by their oppression, and are confounded with the arbitrary will of the ruler, while the will of the ruler again adds terror to the law. The established supremacy and fixed operation of law, which are the best guaranty of security and happiness to the citizens of a free country, afford no consolation to the inhabitants of a despotic state. There nothing is fixed but compliance, nothing is immutable but oppression. The very idea of law, which Burke defines to be beneficence acting by rule, is associated with a blind and fatal power that impoverishes the body and extinguishes the mind. No longer the harmony of the state, it is become a jangling and horrid discord; as if the grand operations of nature which in more favored climes move on in concord, charming with melodious sounds and tranquil motions, here performed their functions with desolating energies and awful clamor.

As the principles of a despotic state are founded in the inertia of the people, all of its force is directed to the stupefaction of the soul. Those great and noble emotions, which stretch beyond the petty interests of self, are carefully repressed. The free and frank expression of opinion, the aspiration after virtue, the paternal temper, and the benevolent heart, are incompatible with the spirit of a despotic state. Sympathy itself, the crutch of misery, is a bond of union, and therefore inimical to its theory. No principle of association can be tolerated. Languid isolation is the settled condition of existence, and the unfortunate subject

finds in his insignificance his only security; conscious only of apathy and languor, all the budding energies of his nature are carefully pruned and diverted from the light. In the emphatic language of Montesquieu, the lot of man in this unhappy state is only instinct, compliance and punishment.

It is therefore impossible to introduce and maintain good legal institutions in a nation whose organic spirit is fear, and in which all those qualities of mind and heart, which render them acceptable and profitable, are extinguished through the very principle upon which the government is established.

No people debased by arbitrary power are fitted for the reception or enjoyment of just and beneficent laws until a radical change has first been effected in the national temper. Some agency, sufficiently powerful to revolutionize the spirit which vitiates the nation, must therefore be applied before any permanent change in the character of its legal institutions can be accomplished.

The decrees of Tiberius against adultery were impotent to check a crime sanctioned by a vitiated public sentiment. The English laws against robbery would hardly reform the predatory habits of Bedouin Arabs, nor could the finest penal code, by its own inherent vigor, have ended the piratical practices of ancient Greece or of modern Barbary. Digests and decrees are powerless without the sustaining force of a virtuous national sentiment; and history as well as philosophy teaches that the reformation of the public temper must precede the introduction and enforcement of proper laws.

Solon declared that he had given to the Athenians the best laws they were able to bear. The spirit of the East Indians proved to be unfitted for the mild Code prepared for them through the instrumentality of Macaulay. The wise and liberal statesman Sir Stamford Raffles declared the people of Java were fitted for the reception of free institutions, but that he was an advocate for despotism in Sumatra. The republics of South America adopted the free institutions of the North American

States; but the spirit which breathed stability and happiness into the latter was totally wanting in the former, and Carlyle declares that when the reign of freedom began, that of order and felicity ceased. De Tocqueville pronounces them the most unhappy governments upon earth. Mexico adopted a constitution similar to that of the United States, but the free spirit that gave life to the latter was wanting, and Mexico has continued the prey of anarchy or of military despotism. It is unnecessary to produce further illustrations of the truth that good institutions cannot be established among a people whose spirit is too corrupt to maintain them

*Second.* The best legal institutions will decline and perish if subjected to the influence of a vitiated national spirit. The wisest laws, though grounded originally in the affections of the people, cannot resist the encroachments of an agency subtle but unceasing, which operating like the deep tides of the ocean beyond the reach of ordinary vision, slowly but surely undermines the proudest structure. Governments and laws are not put together by mere measure and rule. They cannot be successfully constructed upon arbitrary principles, but grow up among the people who use them from simple and natural causes. They resemble the products of nature rather than the refinements of art. They mature like a plant, and derive their qualities from the soil which produces, and the elements which sustain them.

It may be safely affirmed that none of the plans of government, projected by fanciful writers, would have suited any people upon earth without ample modifications. Mr. Locke's famous constitution for the Carolinas proved intolerable to the people who tested it, and demonstrated the futility of those Utopian schemes which are not founded upon the particular interests, passions and prejudices of mankind. It is the spirit of the nation therefore that vitalizes its legal institutions, and preserves them in vigor and usefulness, or silently undermines and destroys them.

Whatever the prevailing sentiment of the people may be, it will exert its force in spite of the barriers that oppose it. Political and municipal regulations are powerless to resist the tide of its progress. If the spirit of commerce predominate, it will often exceed the limits of justice, and the provisions of law. The spirit of conquest will overrun the faith of treaties, and evade the terms of national obligation. Rome, when inflamed with the desire of extending her empire, was not restrained by the language of compacts. Viriathus was assassinated while protected by the peace which he had granted. The people of Numantia were exterminated while they vainly imagined themselves safe under the sanction of a solemn treaty. Manlius made war upon the Galatians under the idle pretext that their ancestors, some centuries before, had plundered the temple of Delphi. The Romans united with the Acarnanians in waging war against the people of Ætolia upon the ground that the Acarnanians had befriended their ancestors a thousand years before by failing to unite with the other Grecian states in sending troops to the siege of Troy. It is therefore vain to imagine that political or legal institutions will retain vigor or expression, if opposed by the predominating sentiment of the people. They will yield with an insensible but irresistible progress to the corruption of the national temper; this alone can breathe into them vitality, or invest them with power.

The gold of Lysander which tainted the frugal spirit, and thus altered the severe policy, of Sparta, proved more fatal than all the fleets and armies of Athens, and prepared the way for the rapid decline of that vigorous and warlike state. The Tarentine colony of the Italian coast, a child from the loins of this sturdy Sparta, exhibited in the feeble spirit and manners of her people the greatest contrast possible to those singular institutions inherited from the parent state, but which her debased spirit rendered unendurable.

The public sentiment, engendered by the political convulsions of the British empire, has constantly overthrown the plainest

provisions of law. Although the statute of Edward III had expressly declared that nothing should be regarded as treason which did not come within its enacting letter, Lord Hale states that during the violence of the reign of Richard II this statute was arbitrarily construed and enforced as one or the other faction prevailed. "The crime of high treason," says Hale in his pleas of the crown, "was adjudged to the disadvantage of the party that was to be judged." The law of Richard III, forbidding taxation without the authority of Parliament, was violated during the reign of Henry VII. A survey of English history will furnish many examples.

The trial by jury has been suffered gradually to decay and perish in the monarchical countries of Europe, because it was not fortified by that national spirit which can alone preserve it in purity; in England, on the contrary, it has been cherished in the heart of the people, and perpetuated in all its original vigor as a vital and indispensable right. A thoughtful study of the constitutional history of the Grecian and Roman states exhibits to the fullest extent the influence of the public temper upon the laws of a country. Institutions which enabled them, while a simple and virtuous spirit prevailed, to attain the largest degree of prosperity, were neglected, perverted, or rescinded, when that spirit grew feeble and corrupt.

*Third.* The prevalence of a proper national spirit will temper the worst institutions, and may ultimately subvert them. The spirit which animates a people, though almost as invisible, is as pervading as the atmosphere, and eliminates by a silent, but irresistible process, the noxious qualities of the laws. Almost imperceptibly it can render soft and flexible the rigid will of the ruler, and infuse confidence and strength into the timid heart of the subject. Its subtle alchemy can distill from arbitrary power itself the mildest and most benevolent practices. In those countries where the will of the ruler is subjected to the least degree of control, by educating and directing that will it can often effectually blunt the keen edge of oppression.

It operates in the gracious exercise of the pardoning power, and in the remission of those severe penalties which distinguish despotic rule. In many of the old English statutes it was enacted that the offender should be punished at the king's pleasure. Under the impetus of a vitiated public sentiment, this authority would have proved a general charter of oppression; but controlled by the free and mild spirit which has usually pervaded the British nation, it was restrained by construction to mean the pleasure of the king as exercised in his courts of justice by the sound discretion of his judges, acting under oath.

By the theory of the British constitution, Parliament is omnipotent, and an act of that body would undoubtedly be effectual to the dissolution of a corporation; but this power, restrained by a liberal public sentiment, rests mainly in theory; and except in the instances of the suppression of the order of Templars in the time of Edward II, and of the religious houses in the time of Henry VIII, no instance is recalled of the arbitrary exercise of this power.

If the state be pervaded by a corrupt or cruel spirit, the force, which a milder public temper would restrain, will descend with merciless energy upon the subject. Henry VII and his ministers were imbued with a spirit of avarice; the common law judges during that reign, consequently, rendered themselves odious by their rigorous enforcement of obsolete penal laws for the purpose of increasing the revenue. Shakspeare, in the character of Angelo, has portrayed the effects of a severe spirit in the ruler, who, in the exercise of his discretion, can awake "all the enrolled penalties" which have for ages, "like unscoured armor hung by the wall."

The operation of the laws is always most uncertain in arbitrary states; for, possessing no inherent and durable vigor, their action is dependent upon the will of the ruler and his subordinates; but a mild and liberal spirit will not permit the enforcement of cruel laws; the benevolent temper which per-

vades the nation descends from the chief to his humblest agent, and mitigates, through the merciful exercise of a wide discretion, a system in itself harsh and inflexible. While the penalties of oppressive laws are thus remitted or softened through the influence of a benevolent spirit, in some cases the law is suspended altogether, being incompatible with the mild sentiments which have penetrated the nation; the subject enjoys from the failure to execute the same security as if the law had ceased to exist. History furnishes many examples of the most cruel laws, which the influence of a merciful public spirit had reduced to a dreadful but dormant threat.

A humane public temper, in addition to its power of obstructing the enforcement of oppressive laws, and in some instances of suspending them altogether, can infuse benevolence into the method and manner of their execution. The fearful spirit of the French revolution exhibited some of its most appalling effects in the obduracy of judges, the cruelty of jailers, and the barbarity of executioners. The brutality of Jeffreys to the unfortunate state prisoners who came before him was more cruel than the laws which he perverted. De Lolme asserts that in some portions of continental Europe, under the administration of the criminal law, accusation and trial are almost as fatal to the accused as guilt. Even in free governments, where the laws are sustained by their own vigor and derived from the consent of the governed, the mild spirit which presides over their administration confers a new security and satisfaction upon the citizen. De Lolme pronounces the humane temper which directs the execution of the penal laws a valuable portion of British liberty. How much more important that this spirit should prevail in an arbitrary government, where laws are enacted for purposes of oppression, and are wielded by a power beyond the reach of control. It is here that the rigid statue of Justice should be veiled in forbearance and mercy.

The benevolent spirit of modern philanthropy has exerted some of its noblest efforts in seeking to soften the asperities

which accompany the enforcement of even the wisest laws. Not satisfied with inculcating that mild spirit which presides with the Judge upon the bench, which tempers the official conduct of the subordinate officers of courts, and which divests those dread tribunals of all unnecessary terrors, it has "dived into the depths of dungeons, and surveyed the mansions of sorrow and pain." It has sought to inspire with a sense of delicacy and forbearance the stern ministers of justice, and to mitigate the severity of its power and ceremonials; it has endeavored to instil benevolence into the hearts of jailers and executioners; it has accompanied the unhappy victim of the broken law to the silence and darkness of his cell, and has sought to inspire with sympathy and pity the mortal instruments which vindicate the last and awful sanction of its power. The influence of a mild, national spirit in mitigating the oppression of severe legal institutions is forcibly illustrated by the early history of the Roman government. A distinguished writer assures us that the ancient Romans, although absolute sovereigns in their families, with the *jus vitæ et necis*, the right of life and death over their children and their slaves, were yet excellent husbands, kind and affectionate parents, humane and indulgent masters. Nor was it until luxury had corrupted the virtuous simplicity of the ancient manners that this paternal authority, degenerating into tyrannical abuses, required to be abridged in its power and restrained in its exercise. The oppressive consequences of the feudal institutions which permeated every part of France, and created so vast a disparity in legal privileges between the nobility and the great mass of the nation, resulted in that political revulsion which buried in one common grave the relics of arbitrary power, the amenities of life, and the consolations of religion. The oppression of the laws was greatly enhanced by the proud and exclusive spirit of the nobles, and the indifference and contempt with which the third estate was regarded. But in the Province of La Vendée a mild and liberal temper prevailed. The humane spirit which pervaded the inhabitants of that section broke the force of those oppressive laws

which in other portions of France descended with cruel energy upon the people. A practical and softening equality was introduced. The intercourse of the several orders of society was spontaneous and kind. The peasant approached without trembling the loftier station of the peer, the noble graciously descended to the level of the swain. Landlord and tenant mingled freely in their rustic employments or sylvan sports, and a generous consideration and kindly regard were thus diffused among all classes. Over this liberal and attractive social life religion extended her benign and equalizing sway. While, therefore, the rest of France was maddened by cruel laws, not softened by a generous public temper, into the overthrow of all law and order, the peasants at La Vendée steadfastly adhered to the ancient institutions, and maintained an affectionate fidelity to their nobles, and a generous loyalty to their king.

A liberal and enlightened national spirit is capable of exerting a very perceptible influence upon the interpretation and construction of laws. Penetrating the breasts of the authorized expositors of those laws, it controls them by a concealed but irresistible force. Even under those legal systems which are the effusion of free institutions, and which, therefore, exhibit a fixed and definite purpose, some room for construction is always provided by the imperfection of human intellect; and the uncertainty of human language. How much greater scope is afforded for the operation of a humane and liberal temper under political systems which imbue their laws with a vague and indeterminate meaning. That accurate scholar, Sir William Jones, has expressed the opinion that the Athenians were probably satisfied with speaking very generally in their laws, and that they left their juries, for juries they certainly had, to decide favorably or severely, according to the circumstances of each particular case. The temper of the community, which the jury necessarily shared, became, therefore, of the utmost importance. There are many courts of justice upon the continent of Europe, whose decisions are regulated by general principles of natural

equity in conjunction with the maxims of the Roman code. In all tribunals of this character, where there is an enlarged judicial discretion, the spirit of the community, which penetrates the courts, is of the utmost consequence to the liberties and the happiness of the subject. But there is always room for construction, even under the most exact systems.

During the period of the civil wars in England, Lord Erskine declared, just as fast as arbitrary constructions were abolished by one statute, unprincipled judges began to build them up again, until they were beat down by another; and he asks if the State trials in bad times are to be searched for precedents, what murders might not be committed, what law of humanity would not be trampled upon, what rule of justice would not be violated, what maxim of wise policy would not be abrogated and confounded.

A Chief Justice of England declared, at a period when the spirit of liberty was depressed, that the laws of England were the King's laws; that it was his prerogative to dispense with them on all urgent occasions, of which he was the sole judge, and that this right was not to be taken away from him. A different rule and practice of construction distinguishes those periods in which a more free and enlightened public spirit prevailed. It has long been settled that the laws of England must be interpreted in accordance with their reason and spirit; the common law is said to demand nothing impossible, and Justice Powell, in a celebrated case, asserted that what is not reason is not law. It has even been intimated that what is inconvenient is contrary to law. While these and similar statements are expressive rather of florid commendation than of an accurate exposition of the common law, they at least indicate the free and enlightened public spirit which pervades the British nation, and animates her judiciary.

In a state imbued with a humane and liberal public temper the expositors of the law will reject, in all doubtful cases, that interpretation which would ground it in oppression, or invest it

with a spirit of severity or injustice. Sir William Blackstone asserts that if collateral consequences, contrary to common reason, arise from the language of an act of Parliament, it is, with regard to these consequences, void, and the judges are at liberty to expound it by equity. While this suggestion is doubtless in derogation of the omnipotent authority of the British Parliament, it indicates no spirit of judicial legislation on the part of the learned commentator, but a liberal and enlightened temper which could not conceive that Parliament would designedly do what was unreasonable or unjust. The Parliament of Paris grounded its judgments upon the edicts of the king when it had once admitted them to registry; but if those ordinances were regarded as grievous to the subject, the parliament refused to place them upon registry on the supposition that they were not really expressive of the royal will; and they then proceeded to make remonstrances against them; in some instances the king deferred to this liberal construction of his parliament; but, if resolved to enforce a measure thus objected to, he was obliged to appear in person, and direct the proper officer to place it upon registry. Many unjust or oppressive laws were thus obstructed or defeated by a mild and generous spirit operating upon their construction.

The legislation of a country naturally succeeds in point of time the development of the national spirit. A liberal and enlightened public temper always foreruns and heralds the enactment of just and wholesome laws, and prepares the way for them by the principles it inculcates, and the usages it originates. Legal maxims and customs are always biased by the prevailing genius and temper of the nation. In the reign of Henry VIII it appears to have been generally held that a common carrier was chargeable, in case of a loss by robbery, only where he was guilty of carelessness or indiscretion; but in the commercial reign of Elizabeth it was resolved by the judges, upon general principles of policy and convenience, that if a common carrier were robbed of the goods entrusted to him, he

should, under all circumstances, be responsible for their value. Many similar illustrations might be furnished of important alterations in legal principles which were effected by judicial construction, directed by the spirit of the period.

A free and enlightened public spirit can not only exert its beneficent influence through the interpretation of laws, but by the construction which it places upon particular facts and events.

Many instructive examples can be furnished of this mode of its exercise, but none illustrate it more strongly than those which may be drawn from the history of English villeinage. Under the Saxon government there were a class of persons in a condition of actual servitude; they were employed in the most menial offices, and, with their children and effects, belonged to the lord of the soil, like the cattle upon it. But this deplorable condition in which a portion of their countrymen, of the same race and capacity as themselves, were kept, was inimical to the free and generous temper which began to pervade the English people and to influence the decisions of the English judges. They therefore seized upon every opportunity to confine so pernicious a system within its narrowest limits, and gradually to destroy it. The issue of a marriage between a free person and a villein, was held to follow the condition of the father, being contrary to the maxim of the civil law that *partus sequitur ventrem*; and the great influence of this doctrine in favor of liberty, consisted in the conclusion that wherever the father was unknown (a condition of affairs of common occurrence under every system of slavery) the issue should receive the benefit of the doubt, and be adjudged free.

The broadest and most liberal interpretation was also placed upon all the dealings of the master with his slave; if he bound himself in a bond to his villein for a sum of money, if he granted him an annuity by deed, if he gave him an estate in fee, for life or for years, if he brought an action against him, in all these instances he was construed to have dealt with him as a freeman, and therefore to have exercised an act of manumission.

In this manner did the free spirit of the nation interpret the acts of the lord ; and so steady and universal was the encroachment upon a system at war with the public temper, that when tenure in villeinage was virtually abolished by the statute of Charles II, there was hardly a pure villein left in the nation.

A humane and liberal national spirit can also mitigate the oppression of severe institutions by seizing with generous avidity upon whatever may be successfully insinuated between the wielder and the victim of power. The moral virtues plead earnestly against the harsh and arbitrary exercise of authority, and the most malicious heart or the most vindictive temper experience some dread of a healthy public opinion, and shrink from the gratification of their propensities at the price of opprobrium and disgrace. It is by appealing to those considerations which influence the generality of mankind, that a benevolent spirit can make itself felt under even the most arbitrary institutions. The wild inhabitants of the Arabian deserts, though living under an arbitrary and anarchical system, are not devoid of humane and liberal sentiments. The generous temper which exists has employed the virtue of hospitality to restrain the practices of a violent government and the turbulence of a lawless people. Hospitality has been invested with the authority of a settled legal custom, with laws of its own, which are as binding as positive regulations. All are familiar with the attractive narrations of its power. It introduces a sort of charm into the wildness of the desert, and sheds a mellow light over the rude life of its inhabitants. The great and powerful bow submissively to its influence ; the weak and unfortunate fly to its protection. It supplies the place of locks and bolts in the midst of savage tribes ; and the man who has tasted of an Arab's salt, can sleep securely in the tent of his enemy. The tendencies of a system, which tolerates the most lawless practices, are thus restrained and tempered to the softness of regulated institutions. Predatory incursions are countenanced and encouraged, and "robber" is an epithet of honor ; but in the

scenes of turbulence and conflict, which necessarily ensue, if the perpetrator of violence himself can touch some third person and claim his protection, the paramount obligations of this law of hospitality palsy the arm uplifted to strike, and retribution melts into mercy before the power of sentiment. Thus, in one of the wildest regions of the earth, does a generous public temper mitigate the ferocity of savage institutions and tribes.

The great influence of the religious sentiment of a people in modifying or thwarting the operation of oppressive laws, is also a most interesting subject of investigation; but more than a brief allusion would exceed the limits of our present inquiry. The appeals made to augurs and oracles in the ancient states, and the extensive application of the wager of battle among the Gothic tribes, are illustrations of that heavenly sanction which, among polished or barbarous peoples, is sought in the operation of laws. Glaucus consulted the Delphian Oracle to ascertain whether he could justly withhold from the owner a deposit entrusted to his care. Every wise legislator endeavors to invest with a divine authority the code which he promulgates, and among instructed and Christian communities, those laws which manifestly violate the will of the Deity as revealed or as discovered by enlightened reason, are considered destitute of binding force. But a false religious sentiment may be perverted to sanction the most pernicious doctrines, and to increase the rigor of those cruel institutions, which, in its pure and genuine application, it can only soften. Sir Matthew Hale complained that the Jesuits in France and elsewhere had made use of the maxims of natural law to encourage theft; and Blackstone relates, with irony, that while the free spirit of the English people was steadily effecting the enfranchisement of all the villeins in the land, the heads of the religious houses, swayed by their scruples about impoverishing the church, continued to retain possession of their own. It is, therefore, manifest that the force of cruel laws can be broken only by the wide diffusion of that pure religious temper which, of itself, introduces a spirit of equality

and mercy, or that the humane and generous temper which pervades the nation must employ the religious sentiment that prevails as the instrument of its benevolent purposes. The tenets of the Mohammedan system are not those of the mild religion of Christ, but they have been humanely used to interpose an insuperable obstacle between the power of the prince and the weakness of the subject. In despotic states, says Montesquieu, religion has more influence than anywhere else; it is fear added to fear. The power of the ruler may be of the most arbitrary character, but he cannot compel his people to violate the established rules of the common faith. These rules may therefore be employed to resist his cruelty and to direct his action. A practical and humanizing equality, which at certain periods brought the lord upon a level with the humblest boor, was introduced into Russian society through the agency of religious festivals; and to this pious assimilation, which periodically leveled ranks and prejudices, may be traced a source of that more liberal and progressive spirit, which has imbued the Russian people. The prevailing religious sentiment of a community must always exert a powerful control over the enactment, interpretation and enforcement of laws. If it be the pure religion of the Christian dispensation, received in its simplicity and vigor, it must finally imbue the nation that has entertained it with a humane and generous spirit, and the asperities of oppressive institutions will melt away in the light of its truth and mercy. But even if it be some monstrous superstition, built by cunning upon those sentiments which are common to mankind, history teaches that a liberal and benevolent public temper can employ it as an effectual instrument to mitigate the ferocity of tyrants and to soften the cruelty of laws.

A beautiful illustration of the power of public sentiment to break the force of the harshest legal institutions was afforded by that system of opinion which grew up in Europe during the darkness of the middle ages. The feudal polity planted by the

northern nations upon the ruins of the Roman empire, however contrary to political justice, was not inimical to liberal and manly sentiments. Amidst the rigors of that military establishment, which the Gothic conquerors extended over Europe, arose a spirit admirably calculated to temper its oppression. Embodying itself in the form of chivalry, which, in the language of Sir James Mackintosh, was more properly its effusion than its source, it acquired a wonderful ascendancy over the minds of rude and lawless chieftains. It supplied the place of fixed legal institutions in an unsettled and ferocious age. The obligations of justice and the dictates of humanity were beautifully incorporated into the system, and merged their natural proportions in the power that enveloped them. Justice, isolated, would have proved too feeble to protect the claims of innocence in an age when arbitrary power was universal. Humanity, separated from its chivalrous concomitants, would have turned a deaf ear to the cries of suffering amidst the wide divisions of rank and the rigors of martial rule. But, absorbed into a system of sentiment, which embodied the peculiar opinions of the age, they performed their holy functions beneath the veil of its disguise, and by the assistance of its power. Those turbulent chieftains, who would have leveled the civil barriers erected for the preservation of public tranquility, dared not trample upon the obligations of chivalry; and municipal codes became less obligatory and respected than the fine-spun theories of a system of opinion.

While the existence of a proper public spirit can thus temper the force of oppressive institutions, it will finally subvert them altogether, if sufficiently diffused and persistent. Its steady operation in the English nation removed, one after another, the relics of feudal tyranny. As is always the case among a people whose temper is free and progressive, the legislation of Great Britain has never kept pace with the spirit of its inhabitants. Its moral melioration has always preceded the reformation of its laws. The severe and unequal features of its legal system

have yielded only to the long and persistent attrition of public opinion. But the strong and swelling tide of the national sentiment has never failed in the end to overthrow such reverend legal vices and hoary iniquities as vainly obstructed its progress. Even those features which it cherished, and touched with a reluctant hand, it has steadily transformed; all objectionable parts have been removed; all obnoxious elements eradicated. The trial by jury, which in other countries has been suffered to decay, in England has been constantly improved. The same evidence of the influence of a liberal and enlightened national spirit is exhibited in the reformation of the laws prohibiting illegal imprisonment, and in the improvement of all those great muniments of political and civil liberty which have distinguished and adorned this nation. Accurate observers have never failed to discover in the prevailing public temper the lineaments of those great changes which it indicated, and finally produced. In the absence of a free and progressive national spirit, time will only consolidate and fortify the worst institutions; while, on the contrary, the most unjust and oppressive laws will relax to its influence, and finally succumb to its power.

While a liberal and enlightened national spirit is thus extensive in its application and powerful in its influence, its prevalence is particularly to be desired in a free government, where all authority resides in the people. A virtuous prince may oppose the passions and resist the corruption of his subjects, and by his personal influence impart vigor or humanity to the operation of laws; monarchical governments, with a national spirit vitiated to the last degree, have been meliorated by the influence of an Antonine or a Trajan; but in a democratic state, the corrosion of a vicious public temper is immediate and universal. Government cannot perform its functions without the direct or mediate action of the populace. Laws are not only enacted, but enforced, by the people. All the complicated machinery of the state is constructed, regulated and directed

by them. The spirit of the State is the State; the forms and operations of the laws are only its outward and practical expression. While the public temper continues free and enlightened, government will perform its functions with harmony and efficiency; but disorder and ruin will visit its sensitive parts if they lose that virtuous lubrication which can alone maintain their complex and delicate motions.

That a liberal, enlightened and virtuous national spirit is essential to the existence and efficacy of a good, legal establishment, will be rendered apparent by the following considerations:

That peculiar class of rights and duties, which Paley styles imperfect obligations, are dependent for their proper exercise and employment upon the temper of the community. Government cannot, by positive regulations, constrain the purity of elections, the incorruptibility of magistrates, and the fidelity of citizens to their civil duties. All these results, so necessary to its prosperity, can be secured only by the assistance of a proper national spirit. To the guardianship of this spirit is entrusted almost entirely the exercise of the right of suffrage, and all the momentous issues which flow from its corrupt or virtuous use.

While a proper national spirit can thus alone secure the due performance of many public duties, authorized or enjoined by law, the punishment which should follow their neglect or criminal exercise is dependent upon the same influence. The impeachment of vicious ministers and magistrates, the indictment and prosecution of popular crimes, the presentation of tolerated abuses, the condemnation of the dread tribunal of a virtuous public opinion, are great national ends, which laws, unaided, are powerless to secure. A great writer declares that the English law has left mercantile integrity to be enforced chiefly by public opinion. English history furnishes many instances of the influence of this spirit. Corrupt practices, which have crept into existence in spite of its authority, have finally succumbed to the punishment it provided. It has purged the

legislature and purified the courts; it has driven corruption from high places, and by the weight of the penalty it visits upon offenders has constrained the occupants of public positions to better counsels and purer practices.

In every free government there are certain suspensive or veto powers legally secured to the people, and sometimes necessary to repress the encroachments and usurpations of the executive. It is manifest, however, that a proper exertion of this means of coercion is dependent entirely upon the free and virtuous temper of the community. The Valerian law, which permitted any citizen condemned to death, banishment or corporeal punishment, to appeal to the people, and which initiated the democratic constitution of the Roman government, furnished the populace a simple means of resisting the arbitrary and oppressive exercise of authority. Under the constitution of the United States the executive is powerless to suspend the writ of habeas corpus, without the concurrence of the people, acting through their representatives. The most effective check to the encroachments of an arbitrary king possessed by the English people consists in the power of the Commons to withhold supplies; and this power has frequently been exerted in behalf of popular freedom. But it is manifest that in all the instances cited the firm and wise exercise of the preventive power depends entirely upon the spirit of the people, and that these great constitutional checks would remain dormant and useless, if the public temper were too complaisant or servile to call them into requisition.

In all free governments, at least in those which have adopted the common law, the system of trial by jury may be regarded as a fundamental feature. While it is an established principle that the judge responds to the law, and the jury to the facts; the two are frequently so intimately blended as to be incapable of severance. In all such cases the jury practically decide the law as well as the facts. The law is, therefore, enforced by men drawn from the community at large, who participate in

its feelings, and are influenced by its spirit. A proper public temper is, therefore, essential to the pure administration of justice. The judges are often elevated above the passions and prejudices which agitate the popular heart, and resist the contagion which has poisoned the mass. But the jury, drawn from the great body of the people, is already steeped in its spirit and tainted by its corruption. The evils that afflict a State arise not only from the defects of its laws, but also from their imperfect execution. Now, where the trial by jury prevails, laws forbidding offences which receive the tacit assent of a depraved public sentiment cannot be rigidly enforced. The laws which prohibit duelling, the carrying of concealed weapons, gaming in its various forms, the illicit intercourse of the sexes, and other offences of a similar character, are often notoriously destitute of coercive force; and juries, responsive to the spirit of the community, refuse to lend their necessary aid to their application and enforcement. A very striking illustration of the influence of national opinion upon positive legal enactment is furnished in the life of Lord Erskine, in his defence of Lieutenant Bourne, of the royal navy, brought before the court of King's Bench, for having sent a challenge to Admiral Sir James Wallace, his commanding officer, who was said to have used him very tyrannically. Erskine declared, "I profess to think, with my worthy friend who spoke before me, that the practice of private duelling, and all that behavior which leads to it, is a high offence against the laws of God, and \* \* that it is highly destructive of good government against men. \* \* But though I feel all this, as I think a Christian and a humane man ought to feel it, yet I am not ashamed to acknowledge that I would rather be pilloried by the court in every square in London than obey the law of England, which I thus profess so highly to respect, in a case where that custom, which I have reprobated, warned me that the public voice was in the other scale."

Every free government is necessarily productive of political parties. The spirit generated by such parties exercises a pow-

erful influence over the opinions and conduct of individuals. The passions which predominate in these jarring and discordant sects, by which free communities are usually divided, are often contrary to the dictates of justice and the obligations of law. Nothing can correct the natural tendencies of these vehement party passions which engross free society, except the influence of a just and virtuous public spirit. If the community be deeply imbued with a strong sense of justice, with a reverence for the laws, and with that humane and generous temper which it is also the province of freedom to instil, limits may be established which even party spirit will not transcend. But in the absence of that virtuous sentiment which pleads for humanity and for justice, all that is valuable in government and attractive in society may be wrecked in the extravagance of its fury. De Tocqueville draws an animated picture of the tyranny which an unbridled party spirit is capable of inflicting: "When an individual or a party is wronged in the United States, to whom can he apply for redress? If to public opinion, public opinion constitutes the majority; if to the legislature, it represents the majority, and implicitly obeys its instructions; if to the executive power, it is appointed by the majority, and is a passive tool in its hands; the public troops consist of the majority under arms; the jury is the majority invested with the right of hearing judicial cases; and in certain States even the judges are elected by the majority. However iniquitous or absurd the evil of which you complain may be, you must submit to it as well as you can."

The customs of an enslaved people, says Montesquieu, constitute a part of their servitude; those of a free people a part of their freedom. National customs, however, are but the result and expression of the national spirit. A free and virtuous public temper is not only the guardian of good institutions, but the instrument which applies and diffuses their blessings; it is always needed for the purpose of aiding and correcting even the wisest and most beneficent laws. It tempers the authority

of magistrates, and dignifies the association of equals. It is experienced in the justice and humanity of the ruler, in the forbearance and urbanity of the citizen. It adorns and lightens the performance of public duty, and sheds an attractive and elevating influence over all the intercourse of life. It produces that sense of personal value and dignity, that consciousness of power, that conception of political equality, which are the source of so many virtues, and bring home to the inhabitants of free countries a constant realization of the happiness their liberty confers. The insolence of lawful office is frequently as hard to bear as the exertion of illegal force, and the coarse or brutal exercise of conferred authority can inflict as deep a wound upon self-esteem and mental serenity as the practices of arbitrary rule. The freedom and enjoyment of social and political intercourse may be marred by the airs of affected superiority and the assumption of a proud and dominating temper, as well as by the force of oppressive laws, or the agencies of despotic rule. The charm of human association is destroyed when a spirit of inequality and injustice assumes the place of generous and liberal sentiment, and mutual confidence and respect are succeeded by distrust and detraction.

The benefits conferred upon a community by the direct operation of wholesome laws are seldom comprehended or appreciated by the mass of the people. Men become accustomed to the legal system under which they live, and learn to view its workings with apathy, and to experience its advantages with indifference. It is only when some disturbing cause breaks the harmony of its justice that they are outraged into reflection, or roused to appreciation. But the manner in which laws are enforced is more obvious to the thoughtful observer, and more extensive in the effect which it produces. The violence or partiality of a judge, the severity of a sheriff, the cruelty of a jailer, excite a wider comment and a deeper emotion than the ordinary failure or success of a suitor. Public sentiment receives a greater shock from the unaccustomed exhibition of a vindictive or

vicious spirit than from the ordinary results of the law, however calamitous in the particular instance. The liberal, manly and virtuous temper, engendered and perfected by free institutions, is easily recognized and appreciated, and is a source of constant enjoyment. The citizen may seldom find it necessary to invoke the protection of the laws, and may fail to realize the accustomed blessings conferred by their ordinary and regular operation. He may not be conscious how much of his happiness is due to the safety of his person and the security of his household and property. He may not pause to felicitate himself upon the fact that his mansion is not penetrated by robbers, nor his life endangered by assassins. He may never experience those miseries of lawlessness which could alone enable him to appreciate fully the blessings of his accustomed security. But the results of a free and virtuous national spirit are constantly felt and enjoyed. Its presence is the better realized because its absence is sometimes experienced. It is felt in the freedom and dignity it confers upon social and political intercourse. It is realized in the glow of the heart and the expansion and serenity of the soul, in the flattery it administers to a proper personal pride, in the production of a manly self respect, in that consciousness of individual significance and political value in the operations of government and the administration of law, which is the source of public virtue, and of a pure and permanent satisfaction.

A virtuous and humane spirit constitutes in one of its results a very important portion of national freedom. It is always productive of a melioration of the criminal legislation of the country. It not only softens the conduct of ministerial officers and tempers the entire administration of the penal code, but it mitigates and abridges the penalties imposed upon delinquents. The severity of punishment is usually due to the hardness of the national heart. A barbarous code is the natural result of a violent and obdurate public temper; and while its most striking effects are exhibited in the rigor of its penalties and

the number of victims who perish by its severity, its most unhappy consequences may be traced in the callous sentiment it produces. In this manner one of these evils begets the other. The want of liberality and mildness in the national temper creates and perpetuates a cruel criminal code, and this in its turn indurates the national heart. Severe penal legislation thus multiplies the very evils it was designed to eradicate. But as a spirit of liberality and mildness extends its influence, the severities of the penal code are gradually displaced. Moderate punishments are found to restrain more effectually than the harshest penalties. The exposure of a public trial becomes as terrible as the pains which follow conviction. Shakspeare makes Borachio say that he would rather seal with his death his villainy, which was already on record, than go over it again to his shame. Shame may thus be made the most potent instrument for the suppression of crime, and, in the language of Montesquieu, whatever the law pronounces a punishment becomes an effectual one.

A people who have been accustomed to the enjoyment of liberty, and are imbued with a free and enlightened spirit, are more sensitive to the advances of power, and more vigilant in the preservation of legal rights and immunities than those actuated by a duller or more complaisant temper. Usurpation begins in trifles. Guilty ambition does not often attain its end by a bold and sudden leap, but by slow and cautious steps graduated with cunning discrimination. These subtle encroachments of power escape the observation of a drowsy or servile spirit, but are readily discovered and thwarted where the national temper is vigilant and free. Both Augustus and Tiberius proceeded with the utmost caution to the consummation of absolute power. The former ostentatiously retained the title of consul, and frequently feigned a desire to abdicate his authority. The degraded spirit of the Roman people was unable to appreciate this subtle consolidation of despotic rule; and the feeble public temper which had succeeded the period of

manly and virtuous sentiments was equally blind and submissive to its accomplishment. But it is the fortunate province of a free national spirit to anticipate the aims of a guilty ambition, and to detect and stifle the first germs of oppression before it has time to collect its energies and concentrate its force. This national temper has preserved the laws and liberties of England through all the political mutations of the empire; and in general, whenever her kings have attempted to step beyond the limits of the law, they have involved themselves in imminent dangers and perplexities.

Every free government contains within itself a principle of improvement. This power of periodical reformation, in accordance with the provisions of law, is one of the chief advantages this constitution enjoys over the political system of a more absolute state. In some governments amendment has been rendered impossible without resorting to revolution; popular advantages are to be obtained only by the temporary destruction of all political boundaries. But where the state is free, the means of alteration may be incorporated into the fundamental law, and progress can be secured by popular action without violence or confusion. It must, however, depend upon the spirit which animates the people, whether this power of amendment shall be exercised upon the proper occasion, and whether the alterations effected shall be reformations, and not merely changes. A fickle public temper is one of the inevitable tendencies of democratic society, and wise and settled principles are often endangered by a reckless spirit of innovation. Where nothing is permanent in political or legal institutions, the sentiment of the community which induces and directs all modifications, becomes of the most vital importance. To this is entrusted the whole constitutional fabric,—not only the careful preservation of its principles, but the wise reformation of its provisions. Should the changes that occur in the state exceed the limit of alteration provided for in the organic law, it is still within the power of a free and educated national temper to accommodate them to the spirit of the

constitution, and to employ them for the popular advantage. The violence of revolution may be controlled to the furtherance of public liberty, and from those great political commotions which naturally tend only to confusion and oppression, may be evoked the elements of regulated liberty and national advancement. The revolutions of a government which has been imbued with a free and virtuous spirit are always distinguished by a forbearance and humanity which never preside over the commotions of an absolute state. The mild and conservative spirit which has penetrated the community still continues to restrain its turbulent tendencies, and to check its licentious development. The spirit of humanity and order which has controlled the revolutions of the British Empire distinguishes them in a marked degree from the political convulsions of the continental states; and they have resulted in securing a larger and more definite amount of popular freedom.

Amid convulsions, says Erskine, arising from the maddest ambition and injustice, while the state was alternately departing from its poise on the one side and the other, the great rights of mankind were still insensibly taking root and flourishing. The constitution has only been established more securely upon its base by those political commotions which if controlled by a different spirit would certainly have deranged or destroyed it.

We have thus indicated some of the intimate relations that exist between the legal institutions of a people, and the national spirit and temper. Laws, on the contrary, exert their reciprocal influence, and to some extent mould, and modulate the national spirit. But this branch of the subject, though interesting and recondite, exceeds the limits of our present inquiry.



## ANNUAL ADDRESS

BY

E. J. PHELPS.

---

MR. PRESIDENT AND GENTLEMEN OF THE ASSOCIATION:—I had hoped to have offered you, this morning, what you may perhaps regard as due to the occasion, a written address. Circumstances not foreseen when I accepted the invitation of your committee, have placed that preparation out of my power, and have reduced me to the necessity either of appearing before you without it, or not appearing at all. I should have accepted the latter alternative, if I had felt myself quite at liberty to disregard such an engagement; and if I had not felt so much solicitude for the success of this our first annual meeting, that I was reluctant to have any of its announcements fail. It seems to me that if these meetings are to succeed, we should regard such invitations somewhat as politicians profess to regard nominations for the Presidency: not supposed to be sought, but not under any circumstances whatever to be declined.

Allow me one word further on this subject. While we shall always listen, I am sure, with greater pleasure and advantage, to the elaborate preparation that produces such admirable papers as we heard yesterday, in the address and the essays that were read to us, I hope that the precedent will not be established among us, that such preparation is indispensable. We all know how difficult in our busy lives it is, at all times to command it. I trust therefore, we shall always feel at liberty, when we are fortunate enough to have anything to say, and to be asked to say it, to address each other in the simple unpremeditated style that prevails in courts of justice. In other words, if gentlemen cannot always redeem their obli-

gations in gold, let us have the silver, even at ninety-two cents on the dollar ; it is much better than total repudiation.

I shall ask your attention to some observations, more desultory than I hoped to make them, on the subject of Chief Justice Marshall, and the constitutional law of his time.

If Marshall had been only what I suppose all the world admits he was, a great lawyer and a very great judge, his life, after all, might have had no greater historical significance, in the strict sense of the term, than the lives of many other illustrious Americans, who in their day and generation have served and adorned their country.

A soldier of the revolution—the companion and friend of Washington, as afterwards his complete and elegant biographer—greatly distinguished at the bar and in the public service before he became Chief Justice—and then presiding in that capacity for so long a time, with such extraordinary ability, with such unprecedented success—if the field of his labors had been only the ordinary field of elevated judicial duty, his life would still have been, in my judgment, one of the most cherished memories of our profession, and best worthy to be had in perpetual remembrance. Pinckney summed up his whole character when he declared that Marshall was born to be the Chief Justice of whatever country his lot might happen to be cast in. He stood pre-eminent and unrivalled, as well upon the unanimous testimony of his great contemporaries, as by the whole subsequent judgment of his countrymen. The best judicial fruit our profession has produced.

Another interest, less important, but perhaps to the lawyer who dwells upon the history of his profession more fascinating, attaches to the life of Marshall. He was the central figure—the cynosure—in what may well be called the Augustan age of the American bar ; golden in its jurisprudence, golden in those charged with its service, and sharing in its administration. We cannot expect, since change is the law of systems as well as of individuals, and of all human affairs, we can never expect to see

hereafter, a jurisprudence so simple, so salutary, so elevated, so beneficent, as the jurisprudence of those days. Perplexed as the law has become with infinite legislation, confused and distracted with a multitude of incongruous and inconsistent precedents that no man can number, it is a different system now, although still the same in name, from that which Marshall dealt with. And it is no disparagement to the bar of our day—and no man esteems its ability and character higher than I do—to say that we can hardly hope to behold again such a circle of advocates, displayed upon a stage at once distinctive and conspicuous, as gathered round the tribunal over which the great Chief Justice presided. The Livingstons, Emmet, Oakley, Dexter, Webster, Pinkney, Wirt, Sergeant, Binney, Hopkinson, Dallas—no need to name them all; their names are household words among lawyers. Well may it be said of them, “the dew of their birth was of the womb of the morning;” the morning of this country; the morning of Republican government; the morning of American law, of American prosperity, of American peace. It is sad to remember, what we all have to remember, how largely the fame of such men rests in tradition; how much of it is *in pais*, and how little on the record. It is the fate of the advocate. However important his labors, or brilliant his talents, they are expended for the most part upon transitory affairs—the concerns that perish—the controversies that pass away. Like the actor, he has his brief and busy hour upon the stage, but his audience is of the hour, his applause of the moment. When the curtain falls, and he is with us no longer, very little remains of all his exertions. Even the memory of them perishes, when the witnesses are gone.

But it is not, in my judgment, as a great judge merely, or in comparison with other great judges, that Chief Justice Marshall will have his place in ultimate history. The test of historical greatness—the sort of greatness that becomes important in future history—is not great ability merely. It is great ability combined with great opportunity, greatly employed. The question will be, how much a man did to shape the course of human

affairs, or to mould the character of human thought. Did he make history, or did he only accompany and embellish it? Did he shape destiny, or was he carried along by destiny? These are the enquiries that posterity will address to every name that challenges permanent admiration, or seeks a place in final history. Now it is precisely in that point of view, as it appears to me, and I venture to present the suggestion to your better consideration, that adequate justice has not yet been done to Chief Justice Marshall. He has been estimated as the lawyer and the judge, without proper consideration of how much more he accomplished, and how much more is due to him from his country and the world, than can ever be due to any mere lawyer or judge. The assertion may perhaps be regarded as a strong one, but I believe it will bear the test of reflection, and certainly the test of reading in American history, that practically speaking, we are indebted to Chief Justice Marshall for the American constitution. I do not mean the authorship of it, or the adoption of it—although in that he had a considerable share—but for that practical construction, that wise and far seeing administration, which raised it from a doubtful experiment, adopted with great hesitation, and likely to be readily abandoned if its practical working had not been successful, raised it I say, from a doubtful experiment, to a harmonious, a permanent, and a beneficent system of government, sustained by the judgment, and established in the affection of the people. He was not the commentator upon American constitutional law; he was not the expounder of it; he was the author, the creator of it. The future Hallam, who shall sit down with patient study to trace and elucidate the constitutional history of this country—to follow it from its origin, through its experimental period and its growth to its perfection—to pursue it from its cradle, not I trust to its grave, but rather to its immortality, will find it all, for its first half century, in those luminous judgments, in which Marshall, with an unanswerable logic, and a pen of light, laid before the world the conclusions of his court. It is all there, and there it will be found and studied

by future generations. The life of Marshall was itself the constitutional history of the country, from 1801 to 1835.

It is difficult for us, at this time, to comprehend the obstacles that attended the original construction and practical administration of the constitution. Since the way through them has been pointed out by the labors of that court, since experience has justified and established those propositions, they seem very plain and clear. Starting from our point of view, and going backward, we can hardly appreciate the embarrassments that attended them in the outset. But the student of history will discover, the lawyer who attends to the growth as well as the learning of his profession will never forget, the discouragements that surrounded that subject when it was first taken in hand. A constitution adopted with great opposition, the subject of the gravest difference of opinion among the wisest men, on its most material points; quite likely to fail, as its predecessor the Articles of Confederation had failed; the object of a heated party spirit and a bitter political controversy; it not only demanded the highest order of judicial treatment, but such as could be reconciled to the universal judgment of the country. Popular opinion is a matter with which independent tribunals have usually but little concern. But in this case it became as vital as the law itself, because no constitution could stand, that proved repugnant to the general sense.

The field was absolutely untried. Never before had there been such a science in the world as the law of a written constitution of government. There were no precedents. Courts of justice sit usually to determine the existing law, in the light of authoritative precedents, and statutes. Originality is neither expected nor tolerated. A magistrate who should bring much original invention to bear in expounding the law, would be apt to prove one of those questionable blessings that "brighten only when they take their flight." An original field of judicial exertion very rarely offers itself. To no other judge, so far as I know, has it ever been presented, except to Mansfield, in the establishment of the commercial law; unless perhaps the

remark may be extended to the labors of Lord Stowell, in the department of English consistorial law, and to those of Lord Hardwicke in equity. Those are the only instances that the long history of our profession under the common law offers, of what may be called an original field of judicial labor.

Such was the task that addressed itself, when Marshall took his seat upon the bench, to the court over which he presided. A task of momentous importance—fraught with infinite difficulty—in a field without precedent—and under the most peculiar and critical circumstances.

It is a singular fact, that although the Supreme Court had been in existence twelve years before 1801, when Marshall was appointed, and though three Chief Justices with brief terms of office had preceded him, only two decisions of that court had been made, on the subject of constitutional law;—the case of *Hylton against the United States*, which affirmed the validity of a tax upon carriages, laid by the State of Virginia, and the case of *Calder against Bull*, in which it was held, that an act of the Legislature of the State of Connecticut, granting a new trial in a civil action, was not in contravention of any provision of the constitution of the United States. Those were the only questions previously decided, in respect to the American constitution. Between that time and 1835, when Marshall died, fifty-one decisions will be found to have been made and reported by that court, on the subject of the law of the federal constitution. In thirty-four of those cases, the opinion was delivered by the Chief Justice; being twice as many opinions as were delivered on that subject, by all the other members of the court together.

I have spoken of this great work, as the work of the Chief Justice—not unmindful certainly of his eminent associates, and especially of Judge Story, who sat with him during a considerable portion of that time. And I take leave to refer to the testimony of Judge Story, lest some may think I have gone too far in attributing the merit of this system of law so largely to Chief Justice Marshall. Judge Story is perhaps the best witness who can testify on that point, because his means of knowledge were complete.

He was not likely to undervalue or disparage the labors of his associates, nor entirely to overlook his own very valuable efforts in that branch of the law. He says, in an article contributed to the North American Review, "We resume the subject of the constitutional labors of Chief Justice Marshall. We emphatically say of Chief Justice Marshall. For though we would not be unjust to those learned gentlemen who have from time to time been his associates on the bench, we are quite sure they would be ready to admit, what the public universally believe, that his master mind has presided in their deliberations, and given to the results a cogency of reasoning, a depth of remark, a persuasiveness of argument, a clearness and elaboration of illustration, an elevation and comprehensiveness of conclusion, to which none others offer a parallel. Few decisions upon constitutional questions have been made in which he has not delivered the opinion of the Court; and in those few the duty devolved upon others to their own regret, either because he did not sit in the case, or from motives of delicacy abstained from taking an active part."

It is to be remembered further, that in only one of all those decisions did the majority of the court fail to concur with Marshall. In the case of *Ogden vs. Sanders*—where the power of the States to pass bankrupt or insolvent laws was discussed, he was for the first and last time, in the minority. Four of the Judges—against the opinion of Judges Marshall, Story, and Duvall—sustained the power of the States to pass such a law; but all concurred in the judgment in that case, which was that a discharge under such a law could not affect a creditor outside the jurisdiction, who had not thought proper to appear and become a party to the proceeding. I need hardly say to an assemblage of lawyers, that as the half century that has passed away since most of those decisions were rendered, has completely established and confirmed and rendered plainer and plainer the soundness and the wisdom of the law they involve, so experience has likewise shown, that in this solitary instance in which his opinion was rejected, the Chief Justice was right. He cor-

rectly anticipated, with a far-reaching sagacity, what would be the result of a system of insolvency, that discharges a debtor in one State, and fails to discharge him in another; that pays one creditor who is within the State, and fails to pay another who is without it. And he clearly perceived, that if that great power was to be reposed at all in the federal government, as it is, and of necessity must be, it ought to be an exclusive power. There is the only and mistaken instance in which his judgment on a constitutional question did not become the law of the land.

And therefore it is to be said, without injustice to his associates, and without injustice to those great lawyers to whom I have alluded, and whose genius and labors were contributed to build up this system of law, that the value and the credit of it, the authorship and creation of it, are principally due to Marshall. And I believe it will be seen in future history, that as Washington brought this people through the revolution to a period when they were able to have a constitution of their own, so Marshall carried the constitution through that experimental period, which settled the question whether it should stand or fall. If this country has profited, and if through this country the world has profited, by the raising of an instrument doubtless the most important since *Magna Charta*, couched necessarily and wisely to a large degree in generalities, into the beneficent government under which we live, it is more largely due to Chief Justice Marshall than to any other man, or perhaps to all other men, who ever had anything to do with it. That is my proposition. Of course if the revolution had failed, it is not probable we should always have continued to be colonies of Great Britain. Some other leader, in some other rebellion, might have carried us through to a condition of independence. If this constitution had perished, republican government might not have perished. Some other tribunal, under some other constitution, might perhaps have reconstructed it. But taking history as it stands—dealing with the constitution under which we live, and not entering upon the vain conjecture of what might have been the conse-

quences if that constitution had fallen, certainly the success of the experiment of republican government may be said to be mainly due to Marshall.

When those celebrated judgments were rendered, the questions involved were set at rest. Even party and partizan spirit was hushed. They passed by universal consent, and without any further criticism, into the fundamental law of the land, axioms of the law, no more to be disputed. Time has demonstrated their wisdom. They have remained unchanged, unquestioned, unchallenged. All the subsequent labors of that high tribunal on the subject of constitutional law have been founded on, and have at least professed and attempted to follow them. There they remain. They will always remain. They will stand as long as the constitution stands. And if that should perish, they would still remain, to display to the world the principles upon which it rose, and by the disregard of which it fell.

Let me say here in passing, that the service ought to be rendered to the history and literature, to say nothing of the constitutional law of the country, of bringing these opinions together in some compilation that should make them accessible to the general student, as well as to the lawyer. They are scattered, as you know, through some twenty-five volumes of reports, practically inaccessible to readers outside the profession. They are known only through a vague reputation, except to the profession, and not perhaps so completely understood by all the profession as could be desired, if we may judge from some of the recent discussions upon the subject. If they could be brought together, not merely as the repository of the foundation stones of the fundamental law of the land, but likewise as among the highest models of logic and reason, and the purest specimens of judicial style, it would be a contribution to American letters and history, that would be valuable and permanent.

I do not propose, as you may well imagine, to enter into any discussion on questions of constitutional law. But a few words

may be pardoned, in respect to the means and the manner by which the result I have spoken of, was achieved; and not only achieved, but rendered so perfectly satisfactory to the whole body of the American people. It seems to me that it all turned upon one cardinal point, and a point which I shall venture to suggest needs to be more frequently recurred to, and more clearly understood. And that is, that the construction of the constitution of the United States, for all purposes for which it requires construction, belongs everywhere and always to the jurisprudence of the country, and not to its politics, or even to its statesmanship. The lawyer or the student, who shall set himself down to follow the labors of that great tribunal from beginning to end, to learn on what foundation they rested, and what was the guide through the maze that proved as unerring as the mariner's compass in the storm, will find it in that salutary principle, set forth with the utmost clearness and unanswerable force in the early case of *Marbury against Madison*, followed up from time to time by repeated decisions, and adopted by all jurists and all courts ever since, that the constitution of this country has by an inevitable necessity, reposed in the judicial department of the government, the sole determination and construction of the fundamental law of the land. In England, whence our institutions were mainly derived, Parliament is omnipotent. It is the tribunal charged with the administration of the unwritten British constitution. Their action in that sphere is final. Any statute they deem it proper to pass is a valid statute, and controls all rights, public and private. The American constitution is based upon a different theory. That difference, as it seems to me, is the distinguishing and almost the only vital difference from the constitution of Great Britain. The mere machinery of the administration of the government, the manner in which the chief magistrate shall be elected—the term of his office—the appointment of his subordinates—these and other details are subject to change, as time and experience shall point out. They are not essential to our system. It is not upon these that

Republican government reposes. It is, I say—and I repeat in order to emphasize more clearly the proposition I desire to present—it is upon the entrusting to the judicial department of the whole subject of the constitutional law, for all purposes, that our government rests.—While that stands and is maintained in its purity, this constitution will stand. The ship will ride as long as the anchor holds, though storm after storm may sweep across the face of the sea. While that remains, the system will remain. Details may be modified and changed, we cannot foresee to what extent. Changes of that sort have already taken place, but the principle I have stated, is the fundamental idea.

That point once established by the court, the simple, the ancient, the salutary, the perfectly intelligible and just principles of the common law, became sufficient for all the purposes of constitutional construction. When the rule of construction of the great compact was shown to be simply a question of law, the law was found perfectly adequate to dispose of it.

No better illustration can be produced in history, of the profound wisdom of that system of jurisprudence known as the common law, than to observe how completely those rules that are applied to the humblest contract, between the obscurest individuals, were found sufficient for the emergency, when a court of justice was called upon for the first time in the history of the world, not merely to adjudicate upon private rights, but to promulgate from the bench the principles of civil government, and to adjust the rights and powers of conflicting sovereignties. If the eulogian of the common law seeks for the most signal illustration of its comprehensiveness, he will find it there. It was by the application to the constitution of those plain and clear rules, that all the results of its construction were satisfactorily worked out.

When we peruse those judgments, we are reminded, especially and above all, how absolutely free they are from all considerations of political expediency, all motives of party politics,

all State craft, or even statesmanship, unless it may be deemed the highest statesmanship to avoid the attempt at statesmanship in judicial construction, and not to confound two very different systems of administration, belonging to two very different tribunals. How perfectly free from all suspicion of party or political bias or feeling those decisions stand! And that, as it appears to me, is one reason why they were accepted by the universal consent of the American people, and have always remained without question or dispute. No political party ever yet convinced its adversaries by argument. Discussion only intensifies the dispute; harmony with a political opponent is only obtained, by the exercise of the courtesy which suspends all discussion on the points of difference. No living man could have addressed to the American people in that first critical half century of the Republic, a constitutional argument based upon party politics, that would have stood an hour. It would have been universally rejected; denied by its opponents, despised by its friends. Marshall, as it is well known, was a Federalist. His political opinions were doubtless pronounced and decided. It was not because he was without political sentiments, that he excluded them from his court. The Federal party, I may be permitted to observe in passing, will perhaps receive better justice from future history, than it has from the past. It went to final wreck about the time of the last war with Great Britain, encountering the usual fate of a party which sets itself in opposition to any war it may be proposed to engage in. But I believe the ultimate justice will be done it, of remembering that some of the greatest and purest men this country ever contained were the founders and leaders of that much abused party. Their views have been generally misconceived. It was not upon the construction of the constitution we have, that they differed from their opponents, but upon the previous question, whether we should have that constitution or some other. It is idle to busy ourselves with conjectures of what might, would, or could have been the history of this country, if the constitution which Washington, Hamilton,

Jay, and doubtless Marshall preferred, had been adopted, because it was not adopted. But Federalist as he was, and whatever may be said of his party or their views, we can find no more trace in any line of those great judgments, that would indicate the political sentiments or bias of the Chief Justice, than if we were to study his opinions upon charter parties, or policies of insurance.

Let me quote on this subject some very forcible and apposite language, from the resolutions adopted by the Charleston bar (I know not who was the author\*) on the occasion of Chief Justice Marshall's death. "Even the spirit of party respected the unsullied purity of the judge, and the fame of the Chief Justice has justified the wisdom of the constitution, and reconciled the jealousy of freedom with the independence of the judiciary."

As every lawyer and every intelligent layman knows, the point of most danger and difficulty in constitutional construction, where the greatest risk of final shipwreck is incurred, is in the attempt to adjust those conflicting—sometimes doubtful—always very delicate—relative rights of the States and the Federal Government. That point, of all others, was treated by the court with the largest sagacity and the greatest wisdom. Critical as were many of the emergencies that arose in those days out of that subject, they were all not only satisfactorily met, but buried and forgotten forever, under the wise and salutary administration of the law which they encountered.

Upon the distinction, so much and so long discussed in some parts of our country, between strict construction and liberal construction in respect to these relative rights, it was the view of the Chief Justice and his associates, that they were unable to perceive what those words meant in that connection, or what just application they had. The court had simply to ascertain the meaning of a written instrument, which upon common principles was to be construed both strictly and liberally;

---

\* Stated by Gen. Lawton, of Georgia, to have been written by Mr. Pettigru.

strictly in ascertaining what powers it contains, liberally in carrying into effect those powers it is found to contain.

Allow me, in taking leave of this point, to read a few words from the language of the Chief Justice himself, out of much that might be usefully quoted did time allow. "In the argument," says he, "we have been admonished of the jealousy with which the States of the Union view a revising power intrusted by the constitution and laws of the United States, to this tribunal. To observations of this character, the answer uniformly given has been, that the course of the judicial department is marked out by law. We must tread the direct and narrow path prescribed for us. As this court has never grasped at ungranted jurisdiction, so will it never, we trust, shrink from the exercise of that which is conferred upon us." Words which are fit to be written in letters of gold, over every tribunal in this country.

One other suggestion in respect to these opinions of Marshall. I have said they were models of reasoning, and of judicial style; and I repeat the remark. If the constitution were out of existence—if the whole subject which they discuss were to become only a thing of the past, of no further human significance, they would still retain their value, as among the most admirable productions in the logic and literature of jurisprudence. There are two kinds of reasoning prevalent at the bar, and prevalent I may say without undue disparagement, sometimes on the bench. There is the reasoning that silences, and the reasoning that convinces; and they are very different things. The casuistry and plausibility, the dexterity and subtlety, the circuitous and round-about processes of indirection which may confound an antagonist who is not strong enough in dialectics to refute them, is altogether a different thing from that simple, direct, straightforward, honest reasoning, that silences as a demonstration in Euclid silences, because it convinces. Such was the reasoning of Marshall, born of the intellectual as well as moral honesty, the tough and vigorous fibre of the man. And this it was, in great measure, that carried home and established in

the understanding and judgment of mankind, the truths it embodied.

It is foreign to my purpose, and beyond the limits I fear I am already transgressing, to follow the labors of the Chief Justice any further. I shall not at all advert to their value, their eminence, their greatness, in so many other branches of jurisprudence besides constitutional law. I shall not try to depict—no poor words of mine could depict—the spectacle which that unassuming but dignified tribunal presented during thirty-five years of time, while with unabated strength he continued to preside there, until the snows of four-score winters had fallen on his head; surrounded by the associates, and the circle of advocates I have before referred to—dealing with the greatest questions, the most important interests, in the light of the highest reason, the finest learning, the most elevated sentiment, and often with an affecting eloquence, which in our busy day has disappeared from courts of justice, to be heard there no more; enshrined in the respect, the affection, the veneration of all his countrymen; no breeze of party conflict but was hushed in his presence, no wave of sectional quarrel but broke and subsided when it reached his feet. His life, strange to say, remains to be written. Lives enough have been thought worth writing, that never were worth living, but the life of the great magistrate is unwritten still. Perhaps it is as well that it should be. Time was needed to set its seal upon the great lessons he taught; experience was requisite to show what was the result of following, and what the result of departing from them. Some day the history of that life—that grand, pure life—will be adequately written. But let no 'prentice hand essay the task! He should possess the grace of Raphael, and the color of Titian, who shall seek to transfer to an enduring canvas, that most exquisite picture in all the receding light of the days of the early republic.

Perhaps the brethren of our profession do not always remember the high prerogative, which under this system of fundamental law, different from any other we know of, the American bar

enjoys. Lawyers in other countries have nothing to do, as lawyers, with constitutional principles of government, or with the basis on which its administration stands. They deal exclusively with the administration of justice, civil and criminal, between man and man, under a government established and fixed, with the operations of which they have professionally no concern. We, on the other hand, are charged with the safe-keeping of the constitution itself. It is from your ranks that judicial vacancies are constantly to be filled up; the lawyers of to-day are the judges of to-morrow. It is by your discussions, in the light of your writings, by the aid of your labors that every successive question that arises touching the fundamental law, is to be adjudicated. Great and distinguished as the English bar is and has been, it never had any such function as this. And that is doubtless one reason, why the great advocates of the period to which I have alluded, were able to achieve such distinction. They were dealing with a class of subjects, which lawyers had never dealt with before. "Your mere *nisi prius* lawyer," said Burke, when harassed with the technical objections of his adversaries on the impeachment of Hastings—"Your mere *nisi prius* lawyer knows no more of the principles that control the affairs of state, than a titmouse knows of the gestation of an elephant." \* The remark was as true as it was pungent, when applied to the bar to which he referred. But it has no just application to ours. If the fundamental proposition I have stated is sound, if the constitution that affords the basis of government as well as of forensic law, belongs to the judicial department to determine and to administer, then it is placed in the safe-keeping of the American bar. And we enjoy, as I have said, such a prerogative as never before was conferred upon a body of advocates.

But does that high prerogative carry with it no corresponding duty? Are we charged with nothing as the price of such a privilege? Have we no other trust to execute in respect to the American constitution, than that which all citizens are charged with, and are expected to perform? It is idle to adjure men to

maintain the constitution, or to compel them to swear to support it. Every man proposes to maintain and support the constitution—as his party understands it. The question is what is the constitution? When a great and critical emergency arises, when a crisis fraught with extreme and vital consequences approaches, what is the constitution? Who is to determine it, and above all, upon what principle and basis of construction? That is the question.

It was pointed out to us in the elegant and scholarly essay of Mr. Mercer, to which we listened last night, how the concurrent testimony of all human experience establishes the truth, that the interpretation and the strength of law is but a reflex of the national spirit out of which all law arises. There is, as it seems to me, a practical and immediate application of that proposition to the legal profession of this country, in this very particular. Their influence is great; their influence upon legislation—their influence upon judicial proceedings—their influence upon the public mind—upon political sentiment, especially in respect to questions particularly within their province. It is from them that the true spirit of the jurisprudence of the country on all subjects, and above all this subject, must of necessity emanate. It is they who make it; it is through them that it must take effect. That political parties will always exist, is inevitable; that they always should exist, is probably desirable; that members of our profession, as of all other professions, should represent all shades of political opinion, and belong to all parties, is to be expected; though I hope on some of them, party ties hang very loose. The question is, how far party differences shall go. Where shall they set out, where shall they terminate? Shall they invade the province of the fundamental law? Is that to be administered by politicians, to be construed by caucuses, to stand or fall upon political considerations, and for the purposes of partizan success? Are not there divergent paths enough, which starting from the constitution as a common ground, and running in every direction through all the ramifications of the administration of govern-

ment, through the whole boundless field of policy, and statesmanship, and expediency, are not they enough for all the purposes of politics, and all the warfare of party? Should not the lawyers of this country meet as on a common ground, in respect to all questions arising upon the national constitution, dealing with them as questions of jurisprudence and not of party, setting their feet upon, and their hands against all efforts to transgress the true limits of the constitution, or to make it at all the subject of political discussion? It is too true, that this constitution of ours, in respect of which it might well be said to him who approaches it, "put off thy party shoes from off thy feet, for the place on which thou standest is holy ground," it is too true, that it has become more and more a subject to be hawked about the country, debated in the newspapers, discussed from the stump, elucidated by pot house politicians, and dung-hill editors, scholars in the science of government who have never found leisure for the graces of English grammar, or the embellishments of correct spelling.

When we reflect upon all this country has passed through, is there no light to be gathered from experience? Should not the members of this conservative profession, "as honorable as justice, as ancient as the forms of law," charged with a duty in this regard so special, and so important, should not they stand together upon these as upon all other questions of jurisprudence, considering and discussing them only upon considerations that belong to jurisprudence, and not upon those that are in the domain of politics? Should not they of all men stand together, and unite to put an end, as I believe they might put an end, if their action was unanimous, not to political controversy—that is neither to be expected nor desired—but to that most destructive form of political controversy, coming from whatever party, or from whatever quarter, or for whatever purpose, that seeks to invade the foundations of the constitutional law, and to plant them on the shifting and treacherous sands of partizan expediency?

And, gentlemen, allow me one further suggestion. What good is to come from this Association, we are trying to build

up? What is to be its significance, or its ultimate value? What is to repay us, or any of us, for turning aside from the current of our busy lives, to meet together here? Questions of detail in the machinery of the law, will be usefully dealt with, no doubt. The pleasure of meeting and forming acquaintances between men of the profession from all the various States, will doubtless be great. But what final good, what permanent usefulness is reasonably to be expected from it, unless it be the creation in our profession, by common consent, by mutual intercourse and support, of a broad, national, elevated, independent, fearless spirit of constitutional jurisprudence? The spirit that builds up and perpetuates, rather than that which pulls down and destroys.

We come together from all parts of our country—our common country—from the scenes of a desolation and sorrow on all hands, that God alone can estimate—over graves numberless to our arithmetic—the harvest of the effort to settle constitutional questions by force of arms. Let it all pass. We come to bury the armed Cæsar, not to praise him. To renew again, in faith and hope, the work which Marshall and his associates began, of cementing and building up on firm and lasting foundations, the American constitution. Is it the court alone that is charged with that duty? Have we no part or lot in the matter? Lingers among us no memory of those who are gone? Comes down to us no echo from our father's time, that shall awake an answering voice?

Fortunately for us all, we have in the successors of the old court, an upright and excellent tribunal. Judges who have addressed themselves, and will continue to address themselves, with great ability, patriotism, and success, to the difficult and embarrassing questions, born of the troubled time. But no court can stand without the cordial support of the bar. It was the strength of Marshall's court, that those great men who rallied about it in the profession, and aided in its discussions, stood by it and sustained it before the country, when

important decisions were made, with a moral force that was adequate to all occasions.

It is idle to say that our sky is free from clouds. It is useless to deny that wise and thoughtful men entertain grave doubts about the future. The period of experiment has not yet passed, or rather, has been again renewed. The stability of our system of government is not yet assured. The demagogue and the caucus still threaten the Nation's life. But we shall not despair. Still remains to us "our faith, triumphant o'er our fears." Let us only for our part, see to it that we discharge the duty that every man owes to his profession. And come what may,

"Thro' plots and counter plots—  
Thro' gain and loss—thro' glory and disgrace—  
Along the plains where passionate discord rears  
Eternal Babel,"

let us join hands in a fraternal and unbroken clasp, to maintain the grand and noble traditions of our inheritance, and to stand fast by the ark of our covenant.

REPORT  
OF THE  
COMMITTEE ON JURISPRUDENCE  
AND  
LAW REFORM.

WILLIAM ALLEN BUTLER, of New York, *Chairman.*

---

TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION:—  
The Committee on Jurisprudence and Law Reform present the following report:

FUNCTIONS OF THE COMMITTEE.

The Constitution of the American Bar Association provides by Article III, for the annual appointment by the President, of Standing Committees, among which is a Committee on Jurisprudence and Law Reform. The special duties of this committee are not defined by the Constitution. Particular subjects pertaining to special branches of the law, to the administration of justice, the enforcement of legal rights and remedies, and the methods of legal education, are confided to other committees.

In view of this distribution of subjects, and of the general purposes of the Association, this committee have considered that their proper duty will be best discharged by attention to such matters embraced in the objects of the Association as may be specially referred to them from time to time. They have accordingly confined their action, during the past year, to

(193)

## THE SPECIAL SUBJECT COMMITTED TO THEM

at the first annual meeting of the Association, at which they were instructed by resolution to enquire into, and report upon "the present condition of the law, as well statutory as established by judicial decisions in the several States, touching the authentication of instruments conveying or affecting real estate, with special reference to the differences in forms of acknowledgment and certification thereof, and with such suggestions as they may deem expedient, looking to greater uniformity therein," and also to make "like enquiry, and report touching the requisites under the law of the several States, in respect to the execution of wills."

In the discharge of the duty thus devolved upon them, the Committee addressed a circular letter under date of January 1, 1879, to leading members of the Association in the several States, soliciting specific information in respect to the subjects embraced in the resolution.

To this circular, replies more or less in detail were received from members of the Association residing and practising in twenty-six out of the thirty-eight States, and a large body of valuable information in reference both to the statute law and the adjudications of the courts relating to the subject of inquiry has been collected, for which the committee tender their grateful acknowledgments to their professional brethren throughout the Union who have thus kindly aided them in their work.

Many items relating to the same general subject are contained in the useful compilation entitled "Hubbell's Legal Directory," the edition of which for 1878-9 has been found by the committee to be very serviceable in supplying information which the committee was unable to procure from direct professional sources.

The execution and acknowledgment of deeds, and the making and attesting of last wills and testaments, are familiar and ever recurring instances of the acts of private persons, regulated as to the manner of their performance by local public law. The interests of society require that these particular acts should be

done in a certain prescribed way. But in all essential respects the acts themselves, wherever performed, are alike. The acknowledgment of a grant or conveyance of land, the execution and attestation of a will are, descriptively, the same acts in Maine and Mississippi, in New York and Oregon. The purpose in every instance of the acknowledgment or the attestation is necessarily identical, to preserve and perpetuate the evidence existing at the time of the transaction, that it was the free, voluntary, and intelligent act of the party whose act it purported to be, and in reality was. There would seem to be no substantial reason why there should not be a like correspondence between the modes of authenticating or attesting the performance of these acts in the several States as exists in reference to the acts themselves. The reason for the acknowledgment or authentication being the same, the rule as to its form might well be the same. We are one people, homogeneous and akin in all our political and social methods, striving together, as all our legislation shows, to simplify the administration of the law, and to conform its methods of procedure and practice to the ideas and wants of our active and progressive age. Throughout the Union there is great similarity if not identity in the tenure of real estate, and the acts by which it is alienated or charged, and there are, in general, no disabilities affecting the disposition of either real or personal property by will peculiar to any State which preclude a mode of execution or attestation which should be common to all.

But, as every lawyer knows, the forms actually prescribed by the statutes of the different States are widely dissimilar. In view of the identity of the object to be accomplished, it would seem as if the ingenuity of law-makers had been taxed to contrive different ways of doing the same thing. Mr. Nettleton, a member of the bar of the city of New York, well known as a commissioner appointed by the executive authority of the several States to take acknowledgment and proof of deeds and other instruments, states to the committee that the forms which he is required to use differ for every State in the Union, except

as to four of the New England States, for which two different forms suffice. An examination of the various forms as reported to the committee, or exhibited in the statutes, will confirm this statement. It would needlessly consume time and space to specify the precise points of dissimilarity in these various forms of acknowledgment. Those which have been longest in use are the simplest. In New England, with the exception of Rhode Island, it is only required that the grantor should acknowledge before a local magistrate his free execution of the deed or other instrument. The justice of the peace or other officer taking the acknowledgment is not required to certify that he knows the person making the acknowledgment, nor is any separate examination of a wife, uniting with her husband in the conveyance prescribed, nor is any special form of acknowledgment or certification necessary in such a case. In some of the extreme southern and western States, on the contrary, the supposed insecurity of life which is sometimes attributed as a reproach to their legal systems, would seem to be measurably compensated by the great caution exacted in respect to the acknowledgment of written instruments affecting the title to land. This will be apparent by contrasting the form of acknowledgment in New Hampshire with that in Texas.

*Form in New Hampshire—husband and wife.*

“STATE OF NEW HAMPSHIRE, }  
County of } ss:

Personally appeared the above-named, A. B., and C. D., his wife, and acknowledged the foregoing instrument to be their voluntary act and deed. Before me, this       day of       , 187 .

[Signature and title.”]

*Form in Texas—husband and wife.*

“STATE OF TEXAS, }  
County of } ss:

Before the undersigned (here insert name and title of officer), in and for the County and State aforesaid, duly commis-

sioned and qualified, personally appeared A. B., and C. D., his wife, to me well known to be the individuals described in, and who executed the above and foregoing conveyance from A. B. and C. D. and in favor of E. F., and they acknowledged to me that they executed the same for the uses, purposes, and considerations therein stated, and that the same is their act and deed; and the said C. D., wife of the said A. B., having been examined by me privily and apart from her said husband, and having the said deed fully explained to her, she, the said C. D., acknowledged the same to be her act and deed, and she declared that she had willingly signed and delivered the same, and that she wished not to retract it.

In testimony whereof I have hereunto set my hand and affixed the seal of my office, on this       day of       , 187 .

[Signature and title.]

[Seal.]

Between these two extremes there are many varieties of expression in the prescribed forms of other States. This is especially the case as to acknowledgments by married women. In South Carolina, for example, the wife uniting in a conveyance with her husband, on a separate examination, instead of the customary declaration that she has executed it without any fear or compulsion of her husband, is required to declare that her act and the renunciation of her estate in the lands conveyed is without any compulsion, dread, or fear of any person or persons whomsoever, a comprehensive disclaimer which sufficiently includes the husband without indicating him as an object of particular suspicion.

In Pennsylvania, where the provisions on all the subjects of our present enquiry are special and indicate unusual care and discrimination, the officer taking the acknowledgment must on a private examination read or otherwise make known to the wife the full contents of each deed or conveyance. In Louisiana, under the tutelary system of the civil law, the officer before whom the act of a joint conveyance by husband and wife is

passed, is required not only to make a separate examination, but also to inform the wife fully of the nature of her rights and interests in the lands of her husband, and the effect of her renunciation, and it must appear on the face of the act that this has been done. In the States of the far West the legislation in respect to the property and rights of married women conforms to the ideas now obtaining general acceptance in this country on this subject, and no particular form of acknowledgment is required in the case of a deed or release of dower executed by a married woman, and she may convey her own lands by deed. A recent statute of New York adopts the same rule, and dispenses with separate or special acknowledgments by married women.

In general the main characteristics of the forms of acknowledgment are the same in most of the States, and the variations relate to the degree of particularity deemed necessary. In each State the precise form in use had its origin in local use or the preference of the lawmakers for words of their own selection, as compared with any pre-existing formula, and the result has been a great diversity of expression in declaring the same facts.

A similar diversity of requirement exists in reference to the forms in use in the several States respecting the proof by subscribing witnesses of the execution of instruments affecting real estate, some of the statutes requiring the subscribing witness (as in New York) to be known to the officer taking the proof; to state his own place of residence; that he knew the person described in, and who executed the instrument; that he saw him execute it; that he acknowledged to the witness the execution thereof, and that the witness thereupon subscribed his name; others dispensing with any requisite except proof by the subscribing witness before the officer of the fact that he saw the execution of the instrument, and became a witness at the time of its execution.

The requisites in the several States in respect to the authentication of conveyances and other instruments affecting real

estate within their boundaries—but executed in other States—also materially differ. In general, acknowledgments and proofs of deeds executed without the limits of any State, may be taken by judges and clerks of any Federal court, judges of courts of record, notaries public, or commissioners appointed by the Governor of the State in which the acknowledgment or proof is to be used. In some States the same power is given to any Mayor or chief officer of any city or town having a seal, and to any officer of the State where the acknowledgment or proof is made, authorized by its laws, to take such acknowledgment or proof, his authority being certified by the clerk of some court of record, or of the county, city, or district in which his official act is performed.

The statutory provisions of some of the States, in respect to the form of authentication of instruments in other States, are very specific and particular. All these provisions are directed to the same end, and seek, by regulations deemed proper and necessary by the legislatures of the respective States, to guard against fraud, imposition, undue haste, or other improper practices, in respect to the authentication of instruments by which the title to land is to be alienated or affected.

The various State statutes, regulating the execution of wills, differ, perhaps, even more than those which apply to deeds and their authentication.

Some of the States permit, while others prohibit, the making of olographic wills; some of them allow nuncupative wills to be made under specific conditions of emergency, while others confine the power to soldiers in actual military service, and mariners when at sea. Some of them require the will to be signed by the testator in person; others, in accordance with the existing statute in England on the same subject, permit a signature by another person at the direction of the testator. The formalities to be observed in executing wills vary as to the acts to be done by the testator and by the witnesses, as well as to the number of witnesses required.

The declaration or publication by the testator of the instrument as his will, required by the English statute in addition to its signing and the written attestation of the witnesses, is also made an indispensable prerequisite of validity to a will in New York and New Jersey, but in most of the States this formality is not essential; while in South Carolina no particular formalities are required, the directions in the English statute being usually followed in practice.

It is a common idea, aided, no doubt, by the practice of many members of the profession, that a will must be sealed as well as signed. But the rule of the common law in this respect, which dispensed with a seal, has been generally followed in the statutes of the several States. The revisers of the statutes of New York, in their note to the statute relating to the execution of wills, state that in the sections reported by them, they had endeavored to condense the provisions of the common law as understood and stated by Justice Blackstone. They retained the distinction between wills of real and personal property, and the requirement that a will must not only be signed by the testator, but also declared by the testator, in the presence of witnesses, to be his will, a regulation which, in many of the States, has been dispensed with, the act of signing and attestation being sufficient to give validity to the instrument as a will.

The principles established by the authorities applicable to the general subject of the authentication of deeds and the execution of wills, are well settled, and there is no serious conflict in the adjudged cases.

Statutory requirements as to the mode and form prescribed, must be strictly followed, but a substantial compliance with them is sufficient, and in aid of the certificate of acknowledgment and proof, reference may be had to the instrument itself, or to any part of it. "It is the policy of the law," says Mr. Justice Field, in the opinion of the Supreme Court of the United States, in *Carpenter vs. Dexter*, 8 Wall., 513, "to uphold certificates where substance is found, and not to suffer convey-

ances, or the proof of them to be defeated by technical or unsubstantial objections." The same liberal rule has been applied in aid of wills where the proof has shown a real, though not an exact conformity with the directions of the statute applicable to its execution.

But the diversity of forms alike as respects deeds and wills, has given rise, and must continue to give rise, to a multitude of vexed and perplexing questions, in both the Federal and State courts. In general, every State recognizes acts done in pursuance of the laws of every other State as valid, so far as those laws can give them validity, but the question of their effect in other States depends upon the statutes of those States as construed by their own local courts, or in cases of controversy between citizens of different States, as construed by the Federal courts. There is thus in respect to this whole subject of such practical concern to all our citizens, affecting at vital points the acquisitions, enjoyment, and transmission of the title to lands throughout our entire territory, a real conflict of laws. As respects each other, the several States of the Union are, so far as relates to the making and the enforcement of the laws governing the acknowledgment and certification of deeds, and the execution of wills, foreign nations. Their respective statutes have no extra-territorial force.

A deed properly acknowledged and certified in Vermont, may be ineffectual to convey the title to lands in Illinois. A will valid in Pennsylvania to pass the title to lands in that State, may be wholly void as to lands in Louisiana.

The Constitution of the United States, it is true, provides (Art. 4, sec. 1), "that full force and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," and Congress, in pursuance of the power conferred by the same article, has, by the Act of May 26, 1790, prescribed the mode of authentication of the statutes, records, and judicial proceedings of the States, and declares that "they shall have such faith and credit given to them in every Court within the

United States, as they have by law or usage in the Courts of the States from whence the said records are or shall be taken." But this statute, as well as the constitutional provision which authorizes it, relates, as interpreted by the Supreme Court, simply to the acceptance as evidence of the statutes, records, and proceedings to which they relate, and not to their legal effect (*Thomson vs. Whitman*, 18 Wall., 457). The independence and sovereignty of the several States as respects local and municipal law and regulation, except so far as they have been expressly transferred to the United States for the purposes specified in the Federal Constitution, are absolute and complete.

No more striking proof or illustration can be found of the vital force of the law as a science, or of its adaptability to human affairs, than by observing its practical operation in the thirty-eight States which now form the American Union. The lawyer, trained in the statutes and under the judicial administration of the particular State of his nativity or adoption, as he passes beyond its boundaries, and visits, in turn, the sister commonwealths, finds a new and never failing source of interest as he encounters in each a separate system of law and jurisprudence, self-centred, complete in all its parts, upholding and executing within its own limits of jurisdiction all the attributes of an independent sovereignty, while in relation to the Federal Union its particular code is administered as a constituent part of one harmonious, comprehensive, and all-embracing plan of government.

But, admirable as it is, this system of diversity and independence in the separately sovereign States of the common Union tends to the indefinite multiplication of perplexing questions in reference to the mode and effect of transactions or acts under the local law of one State, to take effect in another State. In his address before the State Bar Association of New York, at its last annual meeting, Mr. Justice Miller called attention to the fact that under the existing Acts of Congress conforming the practice of the Federal courts to the codes of the several

States, those courts are required to administer the varying and different systems in force in all the States. This, on a larger scale, is the same anomaly as that which we are specially considering—the great and needless diversity of means devised for the accomplishment of the same end. The embarrassment of the Federal judges amid the vexing questions which thirty-eight different codes produce, is kindred to that which every lawyer has experienced, to a greater or less degree, in the annoyance and inconvenience of which the different methods of acknowledgments and certificates in the several States are the fruitful source. The necessity of particular and minute instructions, as to every step in the execution and authentication of instruments outside of his own State, the uncertainty as to the latest provisions of the local law, the fatal facility to mistake which is characteristic of the best-intentioned justices of the peace, the perplexing questions so often arising in the examination of titles, from defects or mistakes in certificates, apparently trifling in themselves, but sometimes the turning points of titles to large estates, these and other illustrations will occur at once to the professional mind and memory as matters of common experience.

It is manifest that the ever increasing intimacy of business and local relations throughout the country, and the increase of population, tend steadily to augment the evils arising from the diversity of statutory regulation on the subject of acknowledgments of deeds and the execution of wills. The questions which must constantly arise upon these statutes occupy the time and thought of lawyers and judges to the exclusion or interruption of what is of greater value and importance. They aid in swelling the already overburdened calendars of our courts, and the overgrown mass of reported judicial decisions. The American bar may well be alarmed at the rapid growth of the State and Federal reports. Well endowed public libraries alone can afford the funds or the shelf room they require. The Federal reports, limited to the Supreme Court of the United States, and the Circuits and Districts which until lately have

afforded scanty materials for the reporter, now number over 200 volumes. The reports of the State courts of New England and New York alone have reached nearly 750 volumes, while the remaining thirty-two States, with not unequal pace, all contribute their annual quota to the formidable list.

West Virginia, admitted to the Union in 1862, has already 11 volumes of reports of its Supreme Court of Appeals. In Minnesota, admitted in 1857, up to July, 1877, 23 volumes of Supreme Court reports have appeared. In Nevada, admitted in 1864, 12 volumes, and in Nebraska, admitted in 1867, 7 volumes have been published.

Many of these recent reports contain valuable contributions to the science of the law by able judges, but so far as they relate, as they largely do, to the construction and application of purely local statutes, including those which prescribe particular forms for the acknowledgment of instruments, and the execution of wills, they are of little value to the general student or practitioner.

It certainly needs no argument to show that if practicable it would be a great gain if substantial uniformity in forms of acknowledgment and the execution of wills in the different States could be attained.

It is difficult to find any good reason why the same form for the acknowledgment, proof, or certification of a deed, or any other instrument affecting real estate, should not be the same all over the Union, or why the requisites in reference to the execution and attestation of wills should not be uniform. The existing English statute—commonly known as Lord St. Leonard's Act—prescribes a rule for Great Britain in respect to wills, which is of universal operation in the United Kingdom, and agrees in substance with the statutory requirements of many of our States. It would be easy to secure, by concurrent legislation, a like uniformity in the United States. But in respect both to deeds and wills, separate legislation is necessary in each State. Uniform rules upon this subject can be

secured only as the result of practical convention or compact between the States. The rules of navigation at sea have, after long effort, gradually, by the concurrence of maritime nations, been formulated in codes which substantially agree, so that the vessels of all nations on the high seas conform to uniform rules adapted to the varying contingencies of navigation. This result has been accomplished by the adoption of rules tested by the experience of different commercial countries, and now made applicable to the wants of all. The rules relating to acknowledgments, and to the execution of wills, depend, like the rules of navigation, upon general principles; but the rules themselves are arbitrary and technical, and in their particular application depend upon the terms of statutes, and not upon any essential necessity or reason.

It cannot be doubted that a genuine and well directed effort towards reform, or at least co-operation, in this matter of common concern, may lead to speedy and important changes in the direction of the desired uniformity. The usefulness of this Association must largely consist in its ability to initiate, or to aid in, measures which shall aim to secure uniformity and simplicity in what is merely demonstrative in the law.

The aggregated intelligence of a profession which is able, in a great public emergency, to improvise a method of determining the succession of the executive department of the national government, and which finds in the ancient writs and processes of the common law of the Mother Country, the ready instruments for controlling the functions of local magistracies, and directing the machinery of municipal law in our newer system of free government, ought to be able to frame a code adapted to general use throughout our country, embodying the essential requisites which should attend the acknowledgment of a deed to a city lot or a section of prairie land, or the execution of a last will.

It may be said that the necessity for uniformity in the statute law of the several States applies with so much greater force to the form of deeds and mortgages than to that of their acknowl-

edgment or authentication. But granting this, the subject of the acknowledgments and proof of deeds, and the execution of wills, forms a distinct branch of statutory regulation, and may properly be dealt with independently of any other branch. The adoption by the different States of simple and identical forms to be used as required by the circumstances of each case, and the conferring upon the same classes of magistrates in all the States the power to take acknowledgments and proofs with a uniform method of certification as to their authority to act, and the adoption of a like uniform mode of executing and attesting wills would tend largely to relieve the profession and the courts throughout the country from grave and needless embarrassments, and to aid in securing that exactness and precision which are to so large an extent the favorite objects of the law.

Confining themselves therefore to this single branch of practical jurisprudence, the committee submit the foregoing suggestions, in which they have sought simply to bring to the notice of the Association facts familiar to the profession, needing no elaborate illustration, and indicating by their mere statements the remedy for the evil to which they relate. If uniformity in the prescribed statutory methods of performing acts which are in substance the same in all the States, and which are being daily transacted in some of them to take effect in others, is really desirable, it can be attained by intelligent, combined, and persevering effort on the part of members of this Association looking to and securing such concurrent legislation by the States as shall give the sanction of each separate sovereignty to a common code recognized and adopted by all.

Besides mere uniformity in practice, it is important that the essential requisites of the acts we are considering should be secured by positive statute. A stricter rule than exists in some of the States should, we think, prevail in reference to the main element which makes the acknowledgment of a deed a safeguard in the transmission of estates, the establishment of the identity of the person executing or acknowledging the instru-

ment with the owner of the estate conveyed. Instances could probably be given by every lawyer in active practice of cases where by false personation and fraud, persons have been deprived of their estates, or seriously embarrassed in the enjoyment of them, and where the mischief might have been prevented but for the lax and insufficient provisions of the statutes in respect to acknowledgments. The requirement of knowledge on the part of the officer taking the acknowledgment of the person making it, and the proper certification of the fact, or of competent proof as to identity, would seem to be indispensable to any proper form for general use. These and other safeguards looking to the prevention of fraud or mistake could easily be matured by concurrent action to that end.

In reference to particular forms which might be the subjects of general acceptance, the committee have not felt authorized, nor are they prepared, to report at present. Such forms should be carefully matured, after conference and co-operation between members of the Association representing all the States. It cannot be expected that the legislatures of those States in which the forms now existing are very simple, would be willing, except for sufficient reason and on due deliberation, to make them more complex, while the more elaborate forms in use in other States are founded upon views which may not easily yield to the demand for uniformity. But much can, doubtless, be readily accomplished by assimilating the forms and methods of the majority of the States in which the existing differences relate to what is non-essential or easy of modification, and in time it may well be hoped that substantially uniformity can be reached. As the result of the views embodied in this report, the committee report for the consideration of the Association, and recommend the adoption of the following

#### RESOLUTION.

*Resolved*, That in the judgment of the Association it is greatly to be desired that action be taken by the several States, by proper and concurrent legislation, to secure uniformity in the acknowl-

edgment and authentication of deeds, and other instruments affecting real estate, and in the mode of executing and attesting wills; and to this end the several Local Councils of the Association are hereby directed to co-operate with the Committee on Jurisprudence and Law Reform, as the committee may request and indicate, in the preparation of forms of acknowledgment, proof, and authentication of such instruments, and of regulations as to the execution and attestation of wills, with a view to securing such uniformity, the same to be reported by the committee to the Association at its next annual meeting.

All of which is respectfully submitted,

WM. ALLEN BUTLER, *Chairman*.  
SIMEON E. BALDWIN,  
HENRY HITCHCOCK.

REPORT  
OF THE  
COMMITTEE ON LEGAL EDUCATION  
AND  
ADMISSIONS TO THE BAR.

CARLETON HUNT, of Louisiana, *Chairman.*

---

TO THE PRESIDENT AND MEMBERS OF THE AMERICAN BAR ASSOCIATION:—The Committee on Legal Education and Admissions to the Bar have the honor to make the following report:

The Committee are profoundly sensible of the importance of the subject referred to their consideration.

Education is the parent of public and of private virtue. By devotion to her, men become profound, expert, learned, and polished. The study of their rights fits them for liberty. Discipline enforces the duty of obedience, and bestows at the same time the qualifications which are indispensable to the ruler. Thus, through the medium of instruction, society is controlled and improved, and mankind is enobled.

Free countries cherish these principles. Liberty and security depend upon them. Where they have been implanted in the hearts of men they triumph over ignorance, error, and wrong; put a term to the agitation and violence incident to popular government, invigorate and perpetuate it.

The American Bar Association was established to accomplish these and similar beneficent ends; to advance the science of jurisprudence, and promote the administration of justice and uniformity of legislation throughout the Union, and to encour-

age cordial intercourse among the members of the American Bar.

Coming together from widely-separated parts of our common country, the members have realized without difficulty that they were known to one another before they met. The rank and standing of members of the profession in the different localities to which they belong is notoriously well settled. In no other profession are principles of subordination more firmly established. The deference shown to experience and length of service at the bar; the distinction which follows reputation for learning and talents; and the precedence accorded to lawyers who have moulded the law by obtaining from the courts leading adjudications, are conspicuous features of professional existence everywhere in America. It comes to pass by the natural course of things, not necessary to be further dwelt upon, that the consideration which the successful practitioner attains where he happens to live, enlarges gradually as he makes progress, until it is felt throughout the State to which he belongs, and, reaching beyond the State, is carried to his professional brethren abroad. In the presence of members of this Association, it is not going too far to add, that there are a number of gentlemen of the bar who realize a still larger distinction, and reach reputation co-extensive with the limits of the country itself.

There is no reason why persons like those referred to, whose lives have been spent in study, and whose exertions have contributed to strengthen the ties of society, and to the amendment and perfection of the law, should not be received by the courts of other States than their own upon the same footing which they hold at home. The practitioner of medicine, who travels abroad, is received everywhere upon no other credentials than his diploma furnishes, into the bosom of the elevated and devoted profession of which he is a member. The services of the civil and mining engineer; those of the botanist, the mineralogist, and the chemist, are eagerly sought for, and the character of such persons recognised and deferred to wherever

known; and it is conceded that the best interests of society are concerned in giving employment, and in doing honor to proficients of this description.

No satisfactory reason, it is submitted, can be given why a different practice should be allowed to prevail regarding members of the bar; why, for example, in the State of New York, a lawyer who has practised many years in another State, cannot appear in the courts until he has served a clerkship of one year in the State; why in the State of Louisiana there is no right at all to practise his profession secured a lawyer from another state, no matter how experienced he may be, unless he begins all over again, and undergoes an apprenticeship, unsuitable and improper, unless in the commencement of professional life.\*

The Committee do not doubt that there will be acquiescence in their views on this part of the subject referred to them. Membership in a great and learned profession like the law, ought to carry with it presumption of merit; and experience and distinction are of right entitled to recognition. It must add to the ties which already connect the States; it must promote good neighborhood and sympathy; stimulate the pursuit of knowledge, and establish a just comity everywhere in the country, to regulate the standing as men of science in the Union of gentlemen admitted to practice in their own States.†

It appears to the Committee eminently proper that the subject of qualifications of candidates for admission to the bar should receive the consideration of the Association. It has been said that the American Bar is the only one in the world which does not concern itself about the qualifications of candi-

---

\* Rept. Committee N. Y. Bar Ass'n, p. 10.

† The French law of March 13, 1804 (see chaps. 14, 15, 16), accorded to doctors and licentiates of foreign universities, who had practised their profession during six months in the kingdom before the promulgation of the law, or been duly inscribed on the list of lawyers, equal rights with the graduates of the universities of France. Code Universitaire, p. 60.

dates for admission to its ranks, and their manners and morals after they are admitted. Such a remark, if it were true, involves a great reflection. Perhaps a greater could hardly be made. It is time then to silence it. It is fit to have it spoken no more. What greater interest can the bar have than the education of its members; and what union is more intimate than that which exists between education and character?

The Committee does not stop to consider the truth or falsity of another charge also made in a most responsible quarter,\* that the general standard of professional learning and obligation began to decline in the greatest of American cities about the year 1840, and preserved a downward tendency until 1870, when it reached its lowest ebb. It is sufficient to note that this is ascribed to the changes in laws regulating admissions to the bar, and by means of which the ignorant, and, it is said, the unprincipled, were launched on professional experience and temptations in extraordinary numbers, without preparation of any suitable kind. The statement is widely published to our discredit by fellow countrymen of our own, and without meeting with denial, that a wiser and more virtuous superintendence is practised in England and in France; and, as a natural and necessary consequence, that the sources from which the profession must be supplied have been kept more pure and honorable in those countries than in the United States.

Without assuming the responsibility of endorsing such a view, it may be safely asserted that the true instrumentality for improvement in our country now is, as it has always proved to be elsewhere, the school of law.

It is shown in the history of Virginius, that schools where the Laws of the Twelve Tables were publicly taught, were to be found in Rome as far back as the fifth century before the advent of our Lord. A course of legal study, lasting five years in place of four, was prescribed by the Emperor Justinian for

---

\* See Committee's Rep. N. Y. Bar Ass'n, pp. 11-13.

students of the law. Every care was extended to them and to professors of law; and, on considerations of public policy, it was forbidden to hold schools of law except at Rome, Constantinople, and Berytus. Justinian designated the latter city as *The Nurse of Legal Science*. Through schools of law, established by favor of government, first at Bologna, and springing up later in other places in Italy and in France, knowledge of the civil law was restored to Europe on the re-appearance of the Pandects (A. D. 1135). Winerius (or Irnerius), Martinus of Cremona, Bulgarus, of the golden mouth, *os aureum*, and his successors, Accursius and others were professors of it. (A. D. 1135–1229.) (Pandectes Françaises, Vol. 1, p. 108, introduction). In 1149 Vacarius, a Lombard, went to Oxford, in England, founded there a school of Roman civil law, and delivered a course of law lectures. (Mackenzie's Roman Law, p. 35.) For a period of four centuries jurisprudence found congenial companionship in literature and poetry, and there was a diffusion of it in connection with them. Dante was born five years after the death of Accursius; Petrarch and Boccaccio were contemporaries of Bartolus, the wonderful jurist who was able to instruct in the law at the age of twenty; and fugitive Greeks from Constantinople, by raising the standard of learning in Italy, greatly improved jurisprudence. Angelus Politianus the friend and protégé of Lorenzo de' Medici contributed powerfully to join classical literature with the study of the law. The sixteenth century is remarkable for legal luminaries, Duarenus, professor of Roman law in Paris, Doneau, Zasius, professor at Freiburg, Hotomannus, Brissonius, and above all Cujacius, the professor of Bourges, whose renown in the schools was so great that at mention of his name every one took off his hat. His works, so to speak, revived the writings of *all* the ancient jurisconsults. Andreas Alciat deserves to be mentioned. He attracted as a professor an incredible number of students of the law in different countries. He taught first at Pavia, afterwards at Bourges, a second time at Pavia, then at Bologna, and finally at Ferrara. Francis I of France and the duke of Milan

contended for the glory of possessing him as a great instructor in the civil law.

The Roman law was cultivated with great success in Spain and the Netherlands, especially after the sixteenth century. Grotius, Vinnius, Huber, Voet, Everard Noodt, Schulting and Bynkershoek are names of great civilians. The law professors of Holland, in the seventeenth century, attained the highest reputation and attracted large crowds of students to Leyden and Utrecht.

More than a century (A. D. 1696–1699) after the death of Alciat, d'Aguesseau exclaimed in a burst of eloquence: "The profession of the law is as ancient as justice, as noble as virtue itself. But it necessarily results that it calls for all the solicitude of government. It concerns too closely the fortune, the honor, and the life itself of citizens to be left neglected. Those, whose purpose it is to practise it, ought to be held to make proof of their studies, of their capacity, of their good morals, and of their probity."

On the continent, Heineccius, the German, who died at Halle in 1741, earned great reputation and authority as a professor of law. It was the professorship in the University of Orleans which furnished Pothier, whose genius was not unlike that of Heineccius, the coveted opportunity, seven years afterwards, for completing his wonderful work entitled *Pandectæ Justinianæ*. It restored order where confusion had prevailed, forged the chain to connect conclusions with the principles from which they are derived, spread light amidst the surrounding darkness, and earned for its author universal fame and immortality. (French Pand., Vol. 1, Intro., p. 111. *Pandectæ Justinianæ*, Tom. Prim. Nov. Ed. Oratio, p. 4.)

In England the great Lord Mansfield held to the same view in this connection which is urged by the Committee. He attributed throughout life great importance to the proper instruction of students of the law, because this he thought advanced the public good. Lord Chief Justice Campbell says he consid-

ered, in common with other wise observers, that lectures and examinations afford the best opportunities for acquiring professional knowledge. Time fails the Committee to appeal to other examples, and to additional authority of modern date. It must suffice, in this place, to allude only to illustrious teachers of law of recent times, and of our own day in particular, in France, in Germany, in England, and in America. The countrymen of Pothier have hastened to follow his example, and have endeavored to emulate his fame as an instructor of youth. It is a difficult task to do them justice. Drawing their inspirations from the pure fountains of the Roman law, and the profound consultations which signalized the adoption of the Code Napoleon, and the subsequent development of its principles, they have treated the law with a degree of scientific method, a depth of knowledge and wisdom, and with a splendor of style and composition, which cannot fail to arouse admiration. Given considerably to controversy, they are in this respect not unlike the jurisconsults of Rome, but like the latter, they keep always present before them the dignity of the texts they are called on to expound. They do not treat them like mere advocates, but discourse in the impartial spirit of great jurists searching after truth. They have advanced the law as a science, and afford safe guides in reasoning, and authority to courts of justice.

In Germany, in the nineteenth century, the noble ardor of the sixteenth has been rekindled. The teaching of the jurists of the Historic School is, that *law is a growth and not a product*, and that it cannot be understood without scientific study of it from its beginnings. Lord Mackenzie (Roman Law, p. 44) gives as distinguished in this connection the names of Hugo, Haubold, Thibaut, and Niebuhr; and in our day Mackeldy, Marezoll, and Warnkœnig. Puchta, whose style has been likened to that of Chancellor Kent, Bruns, Gneist, Holtzendorff (afterwards professor at Munich) are illustrious in the history of the legal faculty of Berlin. Mommsen, Zachariæ, Schlessingen, and Maxen are identified with that of Göttingen. Frederick Charles Von Savigny, who died in 1861, famous as the historian of the Roman

law for the period of the Middle Ages, was a professor at Berlin; and Charles Von Vangerow, author of a treatise on the Pandects, pronounced to be admirable, was a celebrated lecturer, and professor of Roman law at the university of Heidelberg.

In our own time few persons show any disposition to question the conclusion of Lord Mansfield. There can be no more valuable opinion concerning it than that of Judge Story. He considered it manifestly correct, and characterised the one opposed to it as a *delusion*. (Misc. Writings, pp. 91, 92.) He was himself a learned and greatly distinguished professor, and all his abilities and all his views inclined him constantly and strongly to the right side.

There is little if any dispute now as to the relative merit of education by means of law schools, and that to be got by mere practical training or apprenticeship as an attorney's clerk. Without disparagement of mere practical advantages, the verdict of the best informed is in favor of the schools.

The benefits which they offer are easily suggested, and are of the most superior kind. They afford the student an acquaintance with general principles, difficult, if not impossible to be otherwise obtained; they serve to remove difficulties which are inherent in scientific and technical phraseology, and they as a necessary consequence furnish the student with the means for clear conception and accurate and precise expression. They familiarize him with leading cases, and the application of them to discussion. They give him the valuable habit of attention, teach him familiar maxims, and offer him the priceless opportunities which result from contact and generous emulation. They lead him readily to survey the law as a science, and imbue him with the principles of ethics as its true foundation. "Disputing, reasoning, reading and discoursing" become his constant exercises; he improves remarkably as he becomes acquainted with them, and attains progress otherwise beyond his reach.

If, then, the schools of law in America were what they ought

to be, every advantage which is attainable would be offered by them. They would prepare the young men ambitious of a professional career, systematically and scientifically, and year after year add them in sufficient number to the ranks of the profession.

Unfortunately, however, this is not the case. The Committee do not desire to discredit those seminaries of legal learning which have constantly striven for improvement, and which in the face of many adverse obstacles, trials, and discouragements, have always endeavored to advance the standard of professional studies and attainments. Let it be remembered to their honor that there are such schools, and let it be hoped that their example may serve to inspire others. It is only just to add here that rare as didactic efficiency and ability in law lecturers are well known to be, the United States are able to point to a number of such distinguished for the highest degree of success.

But it is difficult to deny that there are American colleges not deserving of commendation. Institutions where the course is unjustifiably limited and circumscribed; where the term of study is evidently too brief for useful purposes; where students continue to be invited, when they are unfit by reason of deficient education and want of contact with liberal studies, to wrestle with the difficulties of the law; where, in a way unworthy of the cause of legal learning, a spirit of competition to attract greater numbers than are to be found in other establishments, is allowed to obtain control; where examinations, which are such only in name, take the place of a searching scrutiny of the student's acquirements; where there is no connection with any influence, except that of a faculty insufficient to meet the demands of a progressive time; where there are no exercises sufficiently serious to try and develop the abilities the student may have; and where degrees are thrown away on the undeserving and the ignorant.

The same abuses, with those just named, made themselves felt in France in the law schools, at the time when the co-exist-

ence of the customary and the written law of that country gave rise to so much confusion and difficulty. Uniformity in legislation is naturally the aim of great abilities; on the other hand, the contemplation of it is overwhelming to inferior minds. The enactment of the Code Napoleon was an era in the history of the law. It gave order and symmetry to French jurisprudence, and fulfilled the best anticipations. Civilization received lasting benefits, mankind were improved, and the science of government progressed. Legal education naturally felt the change. It immediately attracted attention, and there arose a demand for reform, and for a better legal training. Methods of instruction in the law schools were scrutinized, just as they are examined at the present time in our country, and were subjected to similar criticism. A higher standard was insisted on for legal education, and the ways of reaching it investigated and discussed. Why is it—the French jurists argued—and argued unanswerably—that, while a physician is compelled to prove his professional qualifications by a diploma, government does not enforce a similar test in the case of the candidate for the privileges of a practising lawyer? (*Pandectes Françaises*, Vol. 1, pp. 2, 21, 247.)

France made provision for the organization and support of her schools of law. According to the law of March 13, 1804, Art. 1, (23 Ventôse, An XIII,) to date from September 21, 1809, (1 Vendémiaire, An XVII,) it was prohibited for any to practise the calling of a lawyer before the courts without having duly presented his diploma, or his letters as a licentiate in law (*licencié en droit*), procured from the universities. The ordinary course of study was three years. The professors were to conduct the examinations, but in the presence of State Inspectors. The latter reserved to themselves the right to examine. *Code Universitaire* pp. 59, 60, 61.

The discussions in England, in 1872, both in and out of Parliament, on Lord Selborne's bill for the establishment of a general school of law, showed the prevalence, it is claimed, in that

country of an equally strong and enlightened public opinion and to the same effect. The bill made the certificate of the examiners of the school essential to admission to the bar. Rept. Comm., N. Y. Bar Ass'n, New York, 1876, p. 20.

In Germany no one is admitted to the bar who has not been through the full university course, and this of itself presupposes the gymnasial course.

A faculty is a number of learned men in a college, associated together for certain objects. Entrusted with the interests of knowledge they are invested with honorable functions and titles, and have the right of bestowing privileges and degrees upon others. To secure this, corporate powers are given, and in the case of the American law schools there has been special legislation in their behalf, whereunder graduates are admitted to practice without examination in the courts. If, as the Committee hope, the usefulness of the schools is to be universally acknowledged, and their authority in the end made essential as a qualification for practising, they must be brought into a closer sympathy and contact with the profession than is now to be found, and submit to restraints which the necessity of the case make indispensable. It is unjust to students, and a fraud on the public, to recommend them as practitioners until they reach some creditable degree at least of skill and knowledge. As the requirements of a better legal education make themselves felt, proper steps to reach it must be taken, and those of our colleges which may neglect them, will not only suffer by comparison with others where the spirit of progress controls, but also serve to bring in danger the privileges which it is the interest of all to render secure.

As a general thing considerable attention is given at the present time in the schools to the local municipal law, the law of contracts, and of real estate, equity jurisprudence, commercial law, evidence, and pleading. And it may be conceded, without affecting the position assumed by the Committee, that the instruction in the branches referred to is all that it ought

to be. But the same praise cannot be justly given in relation to other studies: that is, it cannot be said that, generally speaking, they have in the United States a due share in courses of instruction. Reference may be here made to the study of the Roman civil law, public law, the maritime law, comparative jurisprudence, constitutional history, and political science.

It is believed, for instance, that, unless in exceptional cases, our law schools have never, for any considerable period, furnished students with the opportunity to be derived from a full scientific course upon the Roman civil law. The statement of such a fact is itself one of the most unfavorable commentaries that the subject affords in relation to legal training in this country. Indeed, no excuse can be made for it. The civilians by whose labor the jurisprudence of this country has been strengthened and adorned—Story, Kent, Ware, Livingston, Duponçeau, Martin, Moreau-Lislet, Roselius, and others—have been followed by few teachers, where there ought to have been many. The loss to learning which has been suffered as a consequence it is impossible to estimate. Perhaps some idea of it, however imperfect, may be formed by referring only to the benefits which have resulted, even under existing circumstances, from the influence of the civil law. They are, of course, too numerous to be pointed out on the present occasion. Suffice it to say that the movement everywhere observable in favor of codification and the use of the symmetry and scientific accuracy of the Roman jurisprudence; simplicity in the execution of testaments; knowledge of the principles of procedure in the instance of courts of admiralty and maritime jurisdiction; the spread over the American States of the doctrine of partnership *in commendam*, and the rising liberality in the general law of partnership, are all traceable to the study of the civil law and the branches of learning with which it is allied.

Happily the ancient rivalry between the common law and the system of the civil law has no place in our American professional life. That life is too progressive, too liberal, and too

enlightened for it. It deals with actual and not with worn-out issues. American civilization appropriates advantages from whatever quarter they may come, and discards what is not suited to it. It resorted to the British Constitution for those institutions which it decided to adopt, but turned away at the same time from those which it did not approve. It must just as naturally instruct its youth in the learning of the civil law, which may be called for, as it will extend study of all kinds required by the growth and development of the national life.

Lord Hale lamented much that the Roman law was so little studied in England. Blackstone recommended the study of it, particularly to the young men of his day. Mr. Austin, in his work on jurisprudence, regrets that this study continues to be neglected in England, and that the real merits of its founders are so little understood; and Lord Mackenzie confessed that Great Britain has contributed little to Roman jurisprudence.

It is not venturing too far to assert that what is thus said of Englishmen is of equal application to ourselves.

The civil law is a precious repository of legal principles. It embraces all previous philosophy. Founded upon natural reason, it appropriates the best institutions of all the nations which were conquered by the Roman arms. It collects everything relating to what is honest and just; to the boundaries between right and wrong; to the regulations of public morality, and to the government of republics, known to the Greeks, and treated by them as merely speculative science, and makes of the whole the foundation of the Roman law. It is the *paladium* of the rights of property, and furnishes the most certain rules of interpretation. It offers solutions for all the difficulties which the complex character of human affairs gives rise to. It has given civilization to Continental Europe, and prevails there as the basis of the general continental system. Without acquaintance with it that system cannot be understood. The ancient writers upon this law are remarkable for courtesy, urbanity and fairness, and at the same time

for brevity, simplicity, clearness and truth. They are also models of erudition and style, talent and genius. Without it the works of the great modern jurists of France and Germany are absolutely inaccessible. It embodies the remains of ancient juristical literature. It presents a model of scientific method and arrangement confessedly superior to any other: it supplies much of the language of international law and diplomacy, and a great part of equity and of the common law itself is derived from it. The laws which make it up, are not acts merely of power and authority, but of wisdom, reason, and justice. Cicero says it contains something divine, whereby it surpasses all the works and maxims of philosophers.

What Judge Story observed of foreign jurisprudence in general may then be truly and wisely said of the civil law. There is no country on earth which has more to gain than ours by the study of it.

The broken columns still mark the place where the Roman forum once stood. They recall to every beholder the undying eloquence with which the accents of Cicero breathed and burned. The walls of the coliseum also remain to attest the Roman grandeur. These are, however, material witnesses only, and their destiny is to pass away. In the end, the pillars, as well as the remains of the great circus, must crumble into dust and vanish from sight. But it will not be so with the laws in the *Corpus Juris Civilis*. They will remain forever, and be handed down to posterity, by ourselves, in the same way they were given to us. They are then the most lasting, they are the only imperishable monument of Rome. Well might the Roman legislator have exclaimed:

Exegi monumentum ære perennius,  
Regalique situ pyramidum altius.

The Committee do not find themselves able to commend the thoroughness with which instruction in public law is generally given. They venture to state that the student who reports

himself as having followed the course most frequently prescribed on the law of nations, is usually furnished with no satisfactory acquaintance with it. He may have read, but if he has, his reading has been to little or no purpose. He has gone over the field, but has not gathered. He has not digested his reading, and cannot apply it. It is impossible for him to retain it. He knows no book at all and cannot stand examination. Vattel is the author most frequently put in the hands of the beginner. He is a widely admired writer, and certainly one of the most elegant; time has been when he was, perhaps, the most popular. His work is, however, open to much criticism. It might be out of place to repeat it here, except for the fact that this is the time and the proper opportunity for opposing objections to the method of proceeding in the schools, and the text books they see fit to adopt. Vattel is deficient in philosophical precision. He discusses his topics often tediously and diffusely, and does not support himself sufficiently by precedents, which underlie the positive law of nations, or what is, practically speaking, the most important part of the law.

The Committee have said enough, on the highest authority, in relation to Vattel (Kent, vol. 1, Lect. 1), to show that his work is not suitable as a text book for the student. It is not necessary to add that there are others of easy access, and writers in particular, who, on account of their national origin and connections, enforcing as they do the lessons of history by the force of American example and authority, are for evident reasons to be preferred.

It is sometimes difficult to combat with success in the student of the present time, the proneness which he exhibits for what he assumes to be practical. He is fluent, and imagines, therefore, that he is eloquent. He wants to make haste, and when he does so he thinks he makes way; he wants to make money; he covets political office, and mistakes it for public honor; he is pressing to be called a lawyer, and impatient of all restraint. A main use of the school of law is to correct these tendencies.

To have it brought home to the student that law is a science, and not an empirical art, and to teach him that any success worthy of being mentioned can only be reached by an acquaintance with liberal studies. It is submitted, indeed, that no part of legal training deserves to be more strongly insisted upon, and that no study can be made, properly speaking, more available in this connection than the law of nations.

The foundation and history of that law, and the connection with it to be found in the growth of the United States as an independent nation, and the development of the principles of the constitution; the rights and duties of nations in a state of peace; the declaration and other early measures of war; the various kinds of property liable to capture; the rights and duties of neutrals; the restrictions upon neutral trade; truces, passports, and treaties of peace, and offences against the law of nations, all are topics, acquaintance with which the Committee find no hesitation in pronouncing to be essential to the proper character of the American lawyer.

It ought to be the part of colleges of law to embrace and extend opportunities for instruction. It is a reproach if they decline them. Youth is the season for forming character, and there is no danger whatever in this time of the world, and in this country in particular, that the influences to which young men are submitted may not tend to make out of them persons sufficiently practical. The student of law is best fitted for his great profession whose education has been most exalted. Public law follows naturally upon academic culture. It is free from the technicalities with which other branches of science are crowded. From the foundation of it by Grotius, it has attracted the most free and elevated minds. To mention no others, in our own country it is identified with the illustrious names of Hamilton and of Webster. It teaches the duties of patriotism by precept and example. It is the true key to general learning and correct political observation. History, philosophy, morals, and religion have contributed to establish and develop it, and

continually to advance it is a chief privilege of the age in which we live.

The attention hitherto given to admiralty and maritime law by the law schools in general, does not, in the opinion of the Committee, entitle them to praise. On the contrary, this must be similarly spoken of with the study of the Roman law. A more remarkable condition of things is difficult to describe. While this branch of jurisprudence has changed and grown in the United States, perhaps beyond any other in the same given time, the schools of law have left it comparatively unexplored, or for the most part, at least, entirely untaught. When the maritime power and destiny of the United States are considered; the great extent of their sea coast; their carrying trade; their commercial intercourse with nations on this continent and across the sea; the importance of their maritime cities; their great inland seas; the unequalled length of their interior water courses; the extension of their jurisdiction over them, and the communication kept up upon them between the different States of the Union, and the wealth and enterprise which are embarked in maritime adventure of every kind, it is almost impossible to understand why it is that it has not been thought just as proper to instruct in the principles of this law as in the municipal law itself.

If the committee were to speak in a practical sense only, they need not hesitate to ask whether any knowledge is apt to be more important to the practising American lawyer, living in a commercial city, than that which relates to the rights and duties of masters and seamen, to material men, mariner's wages, bottomry bonds, contracts of affreightment, salvage, general average, ownership in vessels, surveys of them, collisions, pilotage, wharfage, towage, contracts for the conveyance of passengers, and agreements of consortship?

The reformer of legal education will see here much food for reflection. He will perceive at the same time the necessity for action. The maritime law has reached in our time the pro-

portions of a code of solid and magnificent structure. The learning which underlies it, cannot be too much dwelt upon and understood. Why has it not been suitably taught? Why are so-called Bachelors of Law rushed in such numbers through the schools without any adequate information concerning it?

Besides its many other resources, modern jurisprudence is enriched with the learning of the ancient maritime laws. Their origin was had in the wants of mankind for convenience and security, and when commerce came to distribute among all nations the same arts and customs, maritime commerce looked for and required the enforcement of contracts to which it had given birth, and perfected maritime usages and laws. A knowledge of them is most valuable, and must be cultivated. They are identified with the earliest approaches of civilization, and pervaded with a similitude which offers a striking contrast with civil laws. Experience has tested them, and their usefulness is established. The poet, the scholar, the historian, the philosopher and the lawyer have joined in celebrating their genius. The legislation of civilized countries everywhere, at present, rests in a measure upon them, or recognizes them; and admiralty judges at home and abroad continue to quote, expound, and apply their principles. "*Hæc studia adolescentiam alunt, senectutem oblectant; secundas res ornant, adversis perfugium ac solatium prebent; delectant domi, non impediunt foris; pernoctant nobiscum, perigrinantur, rusticantur.*"

In England it was the glory of Lord Mansfield that he broke down the barriers of former prejudices and infused into the common law an attractive equity unknown to his predecessors. He invigorated and enriched his noble intellect with the study of the Roman civil law. He was also possessed of the soundest principles of the marine law. He was versed in the writings of the maritime continental jurists, Cleirac, Roccus, Straccha, Santerna, Loccenius, Casaregis, and Valin. He incorporated the maritime jurisprudence into the law of his own country, referring to the Rhodian law, to the Consolato del

Mare, Les Jugemens d'Oleron, and the writers upon these, to solve the difficulties not settled by English precedents. Above all, he never wearied of consulting the marine ordinances of Louis XIV.

It was to this same great system of law, regulating as it does the commerce, the intercourse, and the warfare of mankind, that the admiralty Judge of our own country, Judge Story, pronounced a splendid tribute in the decision in the case of *De Lovio vs. Boit* (2 Gallison, 398), a decision which established the maritime jurisprudence of the United States, and which has been followed by the Supreme Court itself down to the present time. The reasoning of it never has been answered and it will always stand as a monument of judicial wisdom.

The Committee are unwilling to prolong discussion beyond the limits which properly belong to an occasion like the present. They can only note some of the prevailing faults in legal education; others will suggest themselves naturally. In their opinion, however, they would omit the discharge of an important part of their duty, if they did not point to the deficiency in legal training, which appears in the United States in the department of comparative jurisprudence.

If ever there was a country in which it was important "to compare the different codes of nations and of States, and to trace their differences to differences of origin, climate, or religious or political institutions, and to exhibit, nevertheless, their concurrence in those great principles upon which the system of human civilization rests," it is our own. Everybody must perceive the truth of such a statement, and yet the schools of law have failed to act in the premises. The American lawyer, who finds himself called to the national legislature, or to argue in the national courts, and especially when he is elevated to the national bench, is surrounded at once by embarrassments which are most trying. In the locality from which he came, he knows the jurisprudence. He has grown with its growth. It is homogeneous in its material, and deals with questions with

which the profession is familiar. But in the new field to which advancing years and honors bring him, every thing is changed. Instead of the laws of a single State in which he was brought up, he is at once plunged into the jurisprudence of thirty-eight States, differing materially in habits, customs, laws, and judicial interpretation. Circumstances compel him to the study of doctrines which are new to him, and to which his best endeavors fail to enable him to do justice. He comes to his task too late, because he comes to it all unprepared. The case may be worse, owing to the same causes. He adopts errors because he is unable to discover them, and makes a record of judicial wrong.

This picture is not indebted to fancy. Unfortunately it deals with naked truths. The past has of course escaped us. The errors which belong to it are numbered with the days which are departed. Nor may it be the part of wisdom to dwell unduly upon these. We cannot say, however, that they were inevitable; and we would be false to ourselves to abandon future opportunity. The remedy for the case is in true reform. It is in bringing the schools of law to the accomplishment of their true mission. This is to enlarge and expand their course of studies. To open the way to the assimilation of state laws and institutions by intelligent comparison. By elevating themselves to elevate their pupils. By giving a national example in advancing legal education, which will reach further than any other means to develop the true national character and the best civilization. When the time comes that the schools of law do this, but not until then, it will be justly said that they have been directed "*Ad rempublicam firmandam, et ad stabiliendas vires et sanandum populum.*"

What they stand in need of now is a firm and stable establishment, one that is conceived with wisdom, and above all in the enlarged and liberal spirit of recent improvement, steadily and vigorously administered, to provide for future usefulness.

The method of instruction which prevails is by lectures and expositions. The manner of teaching is the same with what it

was when law schools were first established. Lessons of professors, either read or delivered without writing, to an attentive student may prove to be invaluable fountains of wisdom and knowledge; but the force of truths thus inculcated, and the principles of sciences taught only in this way, are often lost and prove fugitive and evanescent. It is a useful practice, deserving of more observance than it has received, for the lecturer to recapitulate frequently. He ought to begin by a summary of what was said at the last lecture, and conclude by a similar rehearsal of the lecture just spoken. Keeping up this exercise throughout a course is productive of many advantages. The student comes himself to take a comprehensive view. He is relieved from painful attention to details and the enumeration of authorities. He gets all the advantages of repetition, without the drawbacks which usually attend it. He is taught to condense for himself, and his attention is occupied, his reasoning powers kept actively employed and inflamed, and his imagination entertained by the felicitous introduction, illustration, and general presentation of legal topics which this way of teaching gives rise to.

Such a method of instruction, it will be said, is arduous, and exacting of all the best powers of a professor. So it is. But the plan itself, it cannot be denied, is an admirable one. The Committee would give it even a wider application than it can receive at the hand of those who are called on to do the part of professors. They ought to be aided by competent tutors, examiners, and scientific practical instructors, who will recapitulate the lectures, and thus drill the student in everything essential to make him thorough. Young men eager for the professional distinction of becoming professors themselves, would in this manner form a connection with the faculty of law which must become mutually beneficial. Future graduates of distinction would in their turn become candidates to be examiners. The ties which join alumni with their *alma mater* would be drawn closer, and every natural opportunity afforded for doing what experience proves is necessary for the good of all

colleges, introducing into their daily life and existence, their character and their system of government, the presence, influence, and intelligent coöperation of graduates while the latter continue in the prime of life.

Enough has been said to show that the Committee do not disparage merely practical advantages. On the contrary, they would have the student enjoy them to the fullest extent. But what is insisted upon is, that instead of being incompatible with education in the law school, such advantages are entirely in harmony and in accord with them.

A school organized on the plan suggested would have the means at hand, and ought to make it its duty constantly to enforce proper practical exercises of every kind. Moot courts would be held as a matter of course. Besides these, students would be required to frame bills of indictment, to prepare bills in chancery, to draw up libels in the admiralty, to make correct forms of wills of different kinds, and to write legal essays or opinions upon such topics of professional interest as might be required. Carried on in the presence of the class, these and similar exercises, useless to be enumerated, would serve to stimulate a proper spirit of emulation, and necessarily to produce practical skill. Attendance upon the courts is evidently as easy for the student in the law school as it is for the attorney's clerk, and there is no reason why such a clerk should not also have the privileges of lectures.

It is not considered necessary to argue the merits of written examinations as a final test required for graduation. Those merits are now generally admitted, and any colleges which will hereafter neglect to adopt such examinations, must be contented to give place to others who aim at a higher standard of excellence. Oral examinations are necessarily limited. In a large school they must be a great deal too much so. Experience has shown that they have been for the most part loosely and inartificially conducted. The character of them is notoriously superficial. They are unsatisfactory and inadequate. They are the lotteries

in which the lucky alone draw prizes. They are disastrous to the modest student, and often the ruin of the most deserving. Courts of justice are necessarily without the leisure to hold any other examinations than such as are oral. Even for these they frequently show little inclination. They are not constituted to act the parts of didactic lecturers and public examiners, and ought to be excused from them.

The written examination paper is deliberately and methodically prepared. It naturally becomes searching. The examiner easily makes it comprehensive. The student receives it in the most suitable way. He has leisure to answer, if he can, and room for the display of all the ability he may possess. His performance takes the shape of responses in writing. He cannot, in the nature of things, make them unless he is well informed, and all deception becomes impossible. Finally, all candidates are tried by the same impartial tests, and stand or fall according to real merit.

It follows, from what has been said, that honors ought only to be conferred on the really meritorious, and that the degrees of Bachelor, and that of Doctor, of Laws are to be admitted as evidence of the most satisfactory kind of creditable attainments and abilities. The faculty permitted to grant these ought to be practically unanimous, and sufficiently numerous by their constitution to afford such a course of instruction as is in contemplation of this present report. Faculties of law so instituted and directed by this proper policy, must necessarily have great influence in the publication of works on law and judicial literature. The countrymen of Greenleaf, Story, Kent, Duer, and others, not to mention living authors in the Eastern, Western and Southern portions of our country, whose labors have aided the administration of justice and advanced the study of the law—benevolent spirits who have held aloft the torch of science—are not required to do more than point to experience in support of the views here presented. Given to the study of the law as a science, professors must naturally push their examination of

its principles and general character beyond mere practitioners. The habit of lecturing most frequently brings about the recording or writing down of the lectures. As year succeeds to year, session to session, the professor accumulates material which he would most probably never have collected otherwise. Stimulated by praiseworthy emulation with other teachers, and matured by continued revision, his works are finally given to the press. The profession find them useful, and introduce them into the courts. They become naturally incorporated into the decisions of our own country, and become familiar to the jurists in foreign countries. In this way we have seen "in our generation copious and salutary streams turning and running backward, replenishing their original fountains, and giving a fresher and brighter green to the fields of English jurisprudence."

The progress of this country in the law was, before the American Revolution, only slow. When the struggle for independence was terminated, it became remarkably rapid. (Story's Misc. Works, p. 211, 212). And in our own day, the mass of the law has accumulated with such extraordinary and incredible rapidity as to make the labors of the student almost overwhelming. What would become of him but for those examples of profound research, of marvelous generalization, and of scholarly merit and beauty, which learned professors from their retirement in the shades of collegiate life have furnished their toiling brethren, whose more active lot it is to contend in the halls of justice?

It is a laudable object of the resolutions referred to the Committee to maintain such colleges of law as are already well directed; to strengthen those that are contending for better things, and to raise up such as may be unhappily in danger of failing in their high mission; to give symmetry to legal education as a system; to have it advance and reach, as far as practicable, homogeneity, and a common standard; to inspire the youth who would enter the profession, as well as those who are designed for public life (*ad gerendas res*), with ardor in the pursuit of the law, as well as true emulation, by holding up to them suitable rewards.

The spirit of the resolutions evidently reaches still further. It would be impossible for the Committee to exalt it unduly, if they would. It connects the resolutions with the cause of general learning and with true Americanism. It assumes, as is right, the intimate relation of education and professional character, and the indispensable connection which exists in a country like our own between public virtue, liberty, and the law.

The institutions of free government require education. Ignorance is the parent of slavery. Absolute power will not tolerate enlightened inquiry or true liberty of discussion. These must endanger and destroy it. It banishes emulation and restrains learning. It appeals at once to fear, and, speedily corrupting those themselves who wield it, enforces the arbitrary and depraved edicts of tyrants upon servile submission.

Monarchies cherish the arts of life and the growth of retirement. Montesquieu says they are schools of what the world calls honor. But the undue elevation of a single person must inevitably belittle all others. His habits, his wishes, and even his caprices, will frequently influence, if they do not control, the general education and character.

The case is different with republics. They rest upon equality, and depend for existence itself on the power of education. To maintain their rights, men must first learn what these are, and to practise patriotism be instructed in the duties of citizenship. A corrupt people cannot be free. Thus virtue is the parent of liberty and the main spring of free government.

But the best growth of liberty is the law. The product of order, it is a constant science. It vindicates the right and condemns the wrong; it upholds just authority, and forbids and punishes tyranny. It is the dispenser of justice; the exponent of public and private morality; the shield of innocence; the guardian of the defenceless; the comfort and consolation of the good, and the confusion of the wicked. By its regular course and operation, the fruits of peace are secured, and the evils of war are diminished and assuaged by it. Without it a republic is impossible. In the infancy of such a state, it takes

its rise in the right of every man to be exempt from the dominion of his neighbor, to be protected in person and property, and to the pursuit of happiness in his own way. When the path to public honors and legislative place is unobstructed, ambition is aroused, and impulse given to the noble pursuit of eloquence. While to frame and administer the laws which the progress of society gradually renders necessary, knowledge of every description, and legal knowledge in particular, is sought for and employed. Further guarantees for safety and convenience are exacted in proportion with the new wants of civilized life; and laws themselves, tested by experience, are amended and perfected. In this way—springing into being in the rude struggles of primitive independence, and nursed amidst the stormy tumults of popular discussion—liberal institutions are formed and developed. They are like the hardy oak in its native forests;—the withering heat of summer descends upon it; the ice and snow of winter cover it, and crown its high top; the soft breezes of the south breathe and whisper through its leaves; and its mighty limbs and branches are tossed to and fro in the heaving tempest and the whirlwind. Yet it stands alike in sunshine and in storm. Shaken to its very foundation, but planted by Almighty Power, its roots fix it in its site, striking deep down, and reaching far out into the earth. The clouds of heaven burst over it in vain: it breasts the rising flood, and turns it back, broken and shattered into idle foam! So it is with free governments. They brave the most trying seasons, and are invigorated by the changes and trials they are condemned to encounter. Surviving the perishing arts of life, the shifting fortunes of monarchs, and the fitful conflicts of faction, they afford the blessings of repose and security; and as the crowning glory of all their achievements, the priceless opportunities which ensue for extending the knowledge of mankind.

CARLETON HUNT, *Chairman*,  
HENRY STOCKBRIDGE,  
EDMUND H. BENNETT.

The Committee recommend the adoption of the following resolutions :

*Resolved*, That the several state and local bar associations in the United States be respectfully requested to recommend and further the enactment of laws for assimilating throughout the Union on principles of comity, the standing of members of the bar already admitted to practise in their own states, by admitting to equal rights and privileges as practitioners of law in the courts of all the other states those who have practised for three years in the highest court of the state of which they are citizens.

*Resolved*, That the several state and other local bar associations be respectfully requested to recommend and further in their respective states the maintenance by public authority of schools of law, provided with faculties of at least four well paid and efficient teachers, whose diploma shall, upon being unanimously granted, after a full and fair written examination, be essential as a qualification for practising law.

*Resolved*, That the said state and other local bar associations be respectfully requested to recommend and further in such law schools a general course of instruction, to be duly divided, for ordinary purposes into studies and exercises of the first year, of the second year, and of the third year, including, at least, the following studies :

I. Moral and Political Philosophy.

II. The Elementary and Constitutional Principles of the Municipal Law of England ; and herein :—

1st. Of the Feudal Law ;

2d. The Institutes of the Municipal Law generally ;

3d. The origin and progress of the Common Law.

III. The Law of Real Rights and Real Remedies.

IV. The Law of Personal Rights and Personal Remedies.

V. The Law of Equity.

VI. The Lex Mercatoria.

VII. The Law of Crimes and their Punishments.

VIII. The Law of Nations.

IX. The Admiralty and Maritime Law.

X. The Civil or Roman Law.

XI. The Constitution and Laws of the United States of America, and herein of the jurisdiction and practice of the Courts of the United States.

XII. Comparative Jurisprudence, and the Constitution and Laws of the several States of the Union.

XIII. Political Economy.

*Resolved*, That the said state and other local bar associations be respectfully requested to recommend and further in such law schools the requirement of attendance on at least the studies and exercises appointed for said course of three years, as a qualification for examination to be admitted to the bar.

# REPORT

## OF THE

### TREASURER.

---

*Saratoga Springs, August 20, 1879.*

The Treasurer submits the following Report of the finances of the Association for the year ending Tuesday, August 19, 1879.

The receipts have been as follows:—

Annual dues of members for the year ending August,	
1879, . . . . .	\$1,035 00
Exchange on remittance, . . . . .	0 10
Annual dues for the year ending August, 1880, . . . . .	30 00
	<hr/>
Total receipts, . . . . .	\$1,065 10
	<hr/>

The expenditures have been as follows:

Expenses incurred at the time of organization, . . . . .	\$52 40
Postage, . . . . .	48 65
Stationery and blank books, . . . . .	11 21
Printing (miscellaneous,) . . . . .	47 25
Printing 2,000 copies of proceedings of first meeting, . . . . .	127 00
Clerk hire during the year, . . . . .	30 00
Express on books, &c., . . . . .	4 82
Sundry expenses, telegraphing, &c., . . . . .	8 90
	<hr/>
Total, . . . . .	\$330 23
	<hr/>

The balance now remaining in the treasury, after paying all bills for the first year, is . . . . . \$734 87

Respectfully submitted,

FRANCIS RAWLE.

*Treasurer.*

